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# REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING THE

JUNE TERM, 1855.

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BY J. W. SHEPHERD,  
STATE REPORTER.

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**OFFICERS OF THE SUPREME COURT,**  
DURING THE TIME OF THESE DECISIONS.

---

HON. WM. P. CHILTON, CHIEF JUSTICE.

HON. GEORGE GOLDTHWAITE, } Associate Justices.  
HON. SAMUEL F. RICE, }

---

M. A. BALDWIN, ATTORNEY GENERAL.

JOHN D. PHELAN, CLERK.





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# REPORTS

OF

## CASES ARGUED AND DETERMINED

At June Term, 1855.

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### INGRAM ET AL. vs. THE STATE.

[SCIRE FACIAS ON FORFEITED BAIL-BOND.]

1. *Re-arrest of defendant for same offence no discharge of bail.*—After the defendant has been arrested on a criminal charge, and has given bail for his appearance at court, the magistrate has no authority, on the supposition that his bail are insufficient, to cause him to be re-arrested for the same offence; such irregular re-arrest, therefore, is no discharge of his bail.
2. *Nor is subsequent arrest on another charge, or delivery by another State on requisition of governor.*—The subsequent arrest of the defendant on another charge, or his delivery (after escaping from his bail) by the authorities of another State on the requisition of the governor, when the demand does not seem to be predicated on the same charge, does not discharge his bail; their remedy in such case, it seems, is by application for *habeas corpus*.
3. *Judicial notice taken of sheriffs.*—The courts are bound to know judicially who are the sheriffs of the several counties in the State.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. GEORGE D. SHORTRIDGE.

ABIJAH INGRAM, one of the appellants, having been arrested on a charge of horse-stealing, and required to give bond for his appearance at the next term of the Circuit Court to answer the charge, thereupon entered into the required bond, with his co-appellants, Isbon Ingram and William W. Thompson.

son, as his sureties. At the next term of the court, judgment *nisi* was rendered against the defendant and his sureties for their default, and on this judgment a *scire facias* was issued, which was returned executed as to Isbon Ingram, and not found as to the others; and an *alias scire facias* was subsequently issued, which was executed on said Thompson, and returned not found as to Abijah Ingram. After one continuance of the cause by the defendants who had been served with process, they filed three pleas to the *sci. fa.*; the first of which was *nul tiel record*, and the other two were as follows:

"2. That after the said Abijah Ingram had been arrested by virtue of a warrant, upon a charge of horse-stealing, and the court of inquiry had duly investigated the said charge, and had taken the bond specified in the *scire facias*, and discharged the said Ingram,—representations being made to the said court of inquiry by ——— that the sureties on the said bond were insufficient, thereupon issued another warrant, directed to any lawful officer, commanding him to arrest said Ingram again on the identical charge upon which he had given bond and been discharged as aforesaid; by virtue of which said warrant, the sheriff of the county aforesaid attempted to rearrest the said Ingram while in the custody of his bail, and in said attempt caused him to break from their custody and escape; which discharged the said defendants from all liability on the bond aforesaid.

"3. And the defendants, by leave of the court, further say, that in a short time (to-wit, about two months) after the escape of said Ingram, and before the execution of the *sci. fa.* as aforesaid, and just after the term of the court to which he was required to appear, on application to H. W. Collier, governor of the State of Alabama, he (the said Collier) made a demand on the governor of the State of Louisiana for the body of said Ingram; and by virtue of said demand, the said Ingram was taken, and delivered to one Robert P. Blount, the agent appointed by the governor of the State of Alabama, and brought back to said State of Alabama; thereby depriving said defendants of the power to secure and deliver up the said Ingram, if in fact they were bound to do so: the said Ingram being thus placed in the custody of the law, discharged the said defendants from all obligation on

the bond aforesaid, which they are now ready to verify," &c.

The court sustained a demurrer to the second and third pleas, and its ruling in this behalf is now assigned for error.

E. W. PECK, for the appellants, made these points:—

1. The second plea set up a good defence as to the bail, because it showed that the State, on her part, had violated the contract between her and them, and thereby discharged them from their undertaking.—Code, §§ 3676, 3678, 3685; *Martin v. Chapman*, 5 Port. 344; *The People v. The Judges of Onondaga Common Pleas*, 1 Cowen's R. 54; *Flack v. Eager*, 4 Johns. 185.

2. The third plea, also, shows a good defence—that the State prevented the bail from surrendering their principal, and thereby discharged them.—Code, § 3685; *Pharr & Beck v. Bachelor*, 3 Ala. 245.

3. The judgment against the principal is erroneous, because the record does not show that the two returns of *nihil* as to him were made by an officer of the county in which the undertaking of bail was entered into; and therefore the judgment, being an entire thing, must be reversed as to all the parties. Code, § 3697; *Earle, adm'r &c., v. Reid*, 25 Ala. 463.

M. A. BALDWIN, Attorney General, *contra*.

CHILTON, C. J.—1. The pleas demurred to (Nos. 2 and 3) are clearly bad. The magistrate, having caused the defendant, Abijah Ingram, to be arrested under his warrant, having examined the case, and taken from the prisoner a bail bond for his appearance at court, had no authority again to cause him to be re-arrested for the same offence, upon the supposition that the bail were insufficient. His proceedings in issuing his subsequent warrant were irregular, and furnish no ground of defence to the bail, and would have furnished none, had the principal been arrested under it, much less when it merely operated to induce the principal to break from the custody of his bail.

2. That the principal, after he had escaped from his bail, as above stated, was demanded by the governor of this State of the authorities of Louisiana, and was delivered to the



agent of the Alabama governor, and brought back to this State, is no discharge of the bail. It does not appear that the principal was in the custody of the governor's agent, upon a demand predicated on the charge which he was bound to appear and answer in the Circuit Court by this bond. *Non constat*, that it was not upon another charge—one upon which he might well have been arrested. It could not be maintained that a party who is out on bail for one offence could not be arrested for another by the State—that his being, in legal contemplation, in the custody of his bail, should place him beyond the reach of arrest, and thus purchase for him an exemption from trial for other criminal offences.

We think, where the party is arrested by subsequent process, while in the custody of his bail, and his person is thus transferred to the custody of the law, to answer other offences, the writ of *habeas corpus* to bring the prisoner up for trial, or to be surrendered up in discharge of the bail, furnishes an adequate remedy. Such subsequent arrest, in our opinion, is no discharge of the bail.

3. We are bound judicially to know who are the sheriffs of the several counties.—1 Green. Ev. § 6. There appear to be two returns of *nil* by the sheriff of Tuskaloosa county, where the recognizance was entered into and the proceeding was pending.

Judgment affirmed.

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## MICKLE vs. THE STATE.

[INDICTMENT FOR LARCENY FROM A DWELLING-HOUSE.]

1. *Circumstantial evidence in criminal cases.*—To warrant a conviction in a criminal case, where the circumstances are inconclusive in their character—*i. e.* such that, admitting all they tend to prove, the guilt of the accused is still left wholly uncertain, or dependent upon some definite probability—they must be so multiplied as to increase the probability to an indefinite extent beyond the reach of mere calculation; but this principle does not apply to circumstances of a conclusive character, and therefore, before the appellate

## Mickle v. The State.

court can determine that the primary court erred in refusing a charge which asserted the principle generally, the record must show that the evidence was confined to facts entirely inconclusive in their tendency.

2. The true test is, not whether the circumstances proved produce as full conviction as the positive testimony of a single credible witness, but whether they produce moral conviction to the exclusion of every reasonable doubt.

FROM the Circuit Court of Butler.

Tried before the Hon. C. W. RAPIER.

THE appellant (George Mickle) was indicted in the Circuit Court of Conecuh, at its Spring term, 1855, for larceny from a dwelling-house; and on his application the venue was changed to Butler county. The bill of exceptions states, that the "proof relied on by the State for a conviction, and all the proof in the cause tending to show the defendant's guilt, was purely circumstantial; and upon this state of proof, the defendant's counsel, among other charges, asked the following":—

"1. That it is necessary, in every criminal case, that the evidence should be of such a conclusive nature and tendency, as to exclude every single reasonable doubt of the prisoner's guilt from the minds of the jury, or they cannot convict him."

"4. That before the jury can convict the defendant, they must be satisfied that the circumstances are of such a tendency, and of so conclusive a character, as to make the probabilities of the defendant's guilt exceed all limits of an arithmetical or moral nature."

"6. That in no case ought the jury to convict the defendant upon circumstantial evidence, unless their minds are as fully convinced of his guilt, as they would be if the fact of his stealing the money had been sworn to before them by at least one credible witness."

The court gave the first charge, but refused the others; and these refusals, which were excepted to, are now assigned for error.

WATTS, JUDGE & JACKSON, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

GOLDTHWAITE, J.—When the circumstances are such that, admitting all they tend to prove, the guilt of the accused

is left wholly uncertain, or dependent upon some definite probability only, they are said to be inconclusive; and although it is admitted by Mr. Starkie that mere coincidences may be so numerous as, by the force of multiplied probability, to exclude all reasonable doubt, he says that "this can never happen in the absence of circumstances of a conclusive tendency, unless the probability be increased to an indefinite extent beyond the reach of mere calculation."—1 Stark. Ev. (4 Amer. edit.) 508. Cases of this character stand upon the doctrine of chances, and can seldom (if ever) occur in practice; and as the record does not show that the evidence was confined to facts entirely inconclusive in their tendency, we cannot say that the court erred in refusing to give a charge which was applicable alone to circumstances of that character.

We think, also, that the second charge was properly refused. It is impossible to define what amount of evidence will amount to proof, as it necessarily depends upon the effect it produces upon the mind. The true test, in criminal cases, is, whether the circumstances proved produce moral conviction to the exclusion of every reasonable doubt; and if this result is caused by the evidence, it can make no difference, whether the testimony which leads to it is positive or circumstantial. We think that the former is more satisfactory to a majority of men than the latter, and there are many upon whose minds positive evidence of the lowest degree would produce a fuller conviction, than any circumstantial testimony which was not absolutely demonstrative; but because the same amount of conviction may not be produced, it does not necessarily follow, that the mind of the juror may not be so thoroughly convinced that he would act upon the conviction in matters of the highest concern and importance to himself. It is not easy for any one to compare the relative force of the two kinds of evidence, and say whether the testimony of one witness, swearing positively to the commission of the crime, would not be more conclusive than the facts proved from which guilt was simply to be inferred. Mr. Starkie, it is true, has intimated that the force of circumstantial testimony adequate to conviction should not be inferior to the positive evidence of a single credible witness (1 Stark. Ev. 514); but we have found no adjudged case which supports him, and if this is the law, the

consequence would be, that in a large class of cases, the jury would be driven into mere speculation as to the effect which evidence different from that before them would produce upon their minds. The jury here were told by the judge, that they must not convict, unless the evidence was so conclusive in its character as to exclude from their minds every reasonable doubt as to the guilt of the prisoner; and we think he laid down the true test. If the charge requested had been given in connection with this, the proposition would have been asserted, that although the evidence excluded every reasonable doubt as to guilt, yet if it was not as conclusive as the testimony of a single credible witness, it was not enough; and in that shape it could hardly be supported.

Judgment affirmed.

---

### SMITHERMAN vs. THE STATE.

[INDICTMENT FOR LIVING IN ADULTERY.]

1. *Adultery and fornication distinct offences.*—Under the statute of this State (Code, § 3231; Clay's Digest, p. 431, § 3) adultery and fornication are distinct offences; and therefore, under an indictment for adultery, containing but a single count, no conviction can be had, if the evidence shows that both the parties were unmarried.

FROM the Circuit Court of Bibb.

Tried before the Hon. ROBERT DOUGHERTY.

THE appellant, Noah Smitherman, and one Tempe Manerd, a free mulatto woman, were indicted at the Fall term, 1850, of the Circuit Court of Bibb, for living together in adultery; the indictment containing but a single count. The appellant being on trial alone, the State introduced evidence showing the fact of the illicit connection existing between him and the said Tempe within the time covered by the indictment, and it was further proved that both of them were unmarried at the time. "The court thereupon charged the jury, among



other things, that although the defendant and said Tempe were both single and unmarried persons, they could be found guilty of living together in fornication under the indictment"; to which charge the defendant excepted, and he now assigns it for error.

I. W. GARROTT, for the appellant, contended, that adultery and fornication are essentially distinct offences in their natures, and are so recognized by the statute; and that under an indictment for adultery the defendant cannot be convicted of fornication. He cited Clay's Digest, p. 431, § 3; The State v. Hinton, 6 Ala. 864; Hull v. Hull, 2 Strob. Eq. 174; 4 Black. Com. 64; The State v. Lash, 1 Harr. (N. J.) 380; Commonwealth v. Lafferty, 6 Gratt. 672.

M. A. BALDWIN, Attorney General, *contra*, cited Hinton and Watson v. The State, 6 Ala. 864.

CHILTON, C. J.—The statute has disjoined the offences of adultery and fornication, by declaring that, "if any man and woman live together in adultery, or fornication," &c. (Code, § 3231); and while it is true they both involve an illicit cohabitation between the sexes, yet we are of opinion, that upon an indictment for adultery, a party cannot be convicted of fornication. To constitute the crime of adultery, one of the parties, at least, must be married, as it imports a violation of the marriage bed. We must, therefore, consider this indictment as though the fact of marriage had been averred. In such case, the marriage must be established by strict proof, as in case of bigamy, and on failure to make such proof, the party would, of course, be entitled to an acquittal. Suppose such an acquittal; would this be a bar to a subsequent indictment for fornication? We are clearly of opinion that it would not, and so it was decided in The State v. Cowell & Williams, 4 Ired. L. 231.

We concede that they may be united in the same indictment by different counts, being offences of kindred character, and punishable alike; but, in the absence of a count for fornication, the party cannot be convicted of that offence upon an indictment for adultery. In such case, there is a fatal variance between the offence charged and that proved. It



will not do to say, they both import illicit sexual commerce, and therefore under an indictment for the one the party may be found guilty and punished for the other. The larceny of a white and of a black horse equally imports the felonious taking and carrying away of the personal goods of another; but it would hardly be contended by any one, that upon an indictment for stealing the one, the prisoner could be convicted for stealing the other. In *Plunket v. The State*, 2 Stew. R. 11, it was held, that where the statute described more objects of larceny than one, the legislature are to be understood as mentioning them in contradistinction to each other, and an indictment must be framed according to the particular facts, even though one of the descriptive terms may be sufficiently comprehensive to include all; and the court adds, that "before the defendant receives the statutory punishment, he must be found guilty on an indictment charging the particular offence which he has committed";—citing Stark. Cr. Pl. 214, 249; 2 Hale's P. C. 182-3; 2 Hawk. 480, 486, 615, 616; 3 Chitty's Cr. L. 737; 2 East, p. 576.

It is my individual opinion, that the term adultery, as used in our Code, should be construed with reference to the subjects-matter with which it stands connected. When used with reference to divorce, it is to be taken in the canonical sense of that term, and embraces the infidelity of the husband to his wife, in his illicit sexual commerce with another woman, whether married or single, and so of the wife; but when considered with reference to the criminal law, it imports such sexual intercourse as violates another man's bed—as may entail a spurious issue upon the defrauded husband—"carnal knowledge of another man's wife," as defined by the civil law.—Woods' Inst. 272. Such appears to be the sense in which it was used in the Mosaic law, which punished it with death,—“the man because he hath humbled *his neighbor's* wife” (Deut. xxii, 23, 24, 29); and the sense in which lexicographers regard it.—See the word in Johnson's, Walker's and Webster's Dictionaries; also, Lewis' Cr. Law, pp. 41-43; 3 Arch. Cr. Pl. (edit. 1853), p. 615.

In *The State v. Pearce*, 2 Black. R. 318, it was held, that if a man have criminal intercourse with a married woman, it was adultery, and not fornication. So, in *The State v. Lash*, 1

Harr. R. 380, it was held by the Supreme Court of New Jersey, that an indictment charging a married man with adultery, in having criminal connection with an unmarried woman, should be quashed, as not constituting a good indictment for that offence. On the other hand, it seems to be settled as law in Pennsylvania, resulting, however, rather from an early practice which obtained in that State, than from the deliberate conviction of the courts as to the correct rule, that both parties must be married, or the crime would be fornication. 2 Dall. R. 124 ; 1 Yeates 6 ; 1 Ashm. 269.

In the case before us, it was distinctly proved that neither of the parties was married. The indictment contains a single count for adultery. The judge charged, that if the parties lived together in illicit cohabitation, they might be convicted of fornication ; and the jury thereupon found the defendant guilty in manner and form as charged in the indictment. An intimation is given in *The State v. Hinton and Watson*, 6 Ala. 864, that a conviction for fornication could be had upon such indictment ; but in that case there was a count upon each offence, and the jury found a general verdict. We are of opinion that the charge of the court was erroneous, being inconsistent with the law as we have above laid it down.

The sentence of conviction must, therefore, be reversed, and the cause remanded.

## SALOMON vs. THE STATE.

[INDICTMENT FOR SETTING UP, OR BEING CONCERNED IN SETTING UP, OR CARRYING ON A LOTTERY.]

1. *Form of indictment prescribed by Code, sufficient.*—An indictment in the form prescribed by the Code (No. 73, p. 707), which charges that the defendant “set up, or was concerned in setting up, or carrying on a lottery, without the legislative authority of this State,” is sufficiently certain and definite on motion to quash.
2. *Selling tickets in foreign lottery, as agent, is within the statute.*—Any person who sells in this State any lottery ticket, for or on behalf of any agent, con-

ductor, manager, or proprietor of any lottery which has been set up in this State, or in any other State or country, without the legislative authority of this State, and the prizes in which, at the time of the sale of the ticket, have not been actually distributed, is "concerned in carrying on" such lottery, and therefore guilty of a violation of the statute, (Code, § 3254.)

3. *Charge making conviction depend on proof of agency alone, erroneous.*—A charge which instructs the jury, that the case for the State is made out by proof that "the defendant is the agent" of the persons carrying on any lottery not authorized by our statute laws, is erroneous, because it relieves the State from proving that the defendant, within one year before the finding of the indictment, and within the county in which it was preferred, had done an act which amounts to a violation of the statute.

FROM the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE indictment in this case, which was found at the special May term, 1855, of the City Court, was as follows:—

"The grand jury of said county charge, that, before the finding of this indictment, A. M. Salomon set up, or was concerned in setting up, or carrying on a lottery, without the legislative authority of this State, against the peace," &c.

The bill of exceptions states, that the defendant, at the trial, "moved to quash the indictment, 1st, for want of certainty; 2dly, because it should have set forth the name of the lottery, or so described the lottery, if the name was unknown, as to have enabled the defendant to prepare his defence; and, 3dly, because it is insufficient. This motion was refused, and the defendant thereupon excepted."

"The proof was, that the defendant had sold Maryland lottery tickets, Havana lottery tickets, and Georgia lottery tickets; but there was no proof of his connection with said lotteries, or either of them, except that he vended the tickets. The court charged the jury, 1st, 'If you believe that defendant is the agent of the persons carrying on either of the lotteries testified to, the State has made out its case'; 2dly, 'If you believe that the defendant is shown to have been engaged in the business of selling lottery tickets of a lottery to be drawn, it would amount to being concerned in carrying on such lottery.' To these charges the defendant excepted, and asked the court to charge the jury, that selling lottery tickets alone, or buying and selling lottery tickets, does not constitute the offence of being concerned in setting up or



carrying on a lottery ; which charge the court refused, and the defendant excepted."

These several rulings of the court are now assigned for error.

R. H. SMITH, and MANNING & WALKER, for appellant :

1. The mere fact of being the agent of a person who carries on a lottery out of the State, is not a violation of the statute. *Yates & McIntyre v. O'Neale & Smith*, 3 Gill & J. 253. The charge would seem to apply to any agency, though it had no relation to a lottery.

2. The mere act of vending tickets in a foreign lottery is not an offence against the statute.—*Mount & Wardell v. Waite*, 7 Johns. 440. The statute is penal, and cannot be extended by construction. Selling tickets is a different thing from carrying on, or being concerned in carrying on the lottery : one may sell tickets, and yet have no concern in carrying on the lottery. Again, the statute only relates to lotteries in this State.—See *Smith's Commentaries on Statutes*, §§ 743, 746, 747 ; *Scribner and Barker's cases*, 2 Gill & J. 246.

3. To show error in the first charge, see 21 Ala. 9.

M. A. BALDWIN, Attorney General, *contra* :

1. It was not necessary for the indictment to allege that the lottery was within this State, nor that it should be specified by name.—*Commonwealth v. Clapp*, 5 Pick. 41 ; *Commonwealth v. Hooper*, *ib.* 43.

2. The prohibition of the statute extends to all lotteries not authorized by a law of this State, or of the United States. *Commonwealth v. Dana*, 2 Mete. 338 ; *The People v. Sturdevant*, 23 Wend. 420 ; *Hunt v. Knickerbacker*, 5 John. 332.

3. The selling of tickets in lotteries not authorized by the laws of this State, is a participation in the carrying on of such lotteries, and therefore indictable. In the commission of crimes, a party is guilty either as principal or accessory ; but in misdemeanors (as in treason) there are no accessories—all are principals.—1 *Chitty's Criminal Law*, p. 261 ; 1 *Archb.* (by Waterman), pp. 11 to 17 ; 3 Pick. 29 ; 2 B. Mon. 417 ; 3 Wash. C. C. R. 238. Whatever constitutes one an accessory before the fact in a felony, renders him lia-

ble as a principal in misdemeanors.—*State v. Westfield*, 1 Bail. 132 ; 12 Wheat. 475. Books kept in relation to proceedings respecting a lottery, have been held materials for a lottery.—*Commonwealth v. Dana*, *supra*. No action could be maintained on a contract made for the sale here of tickets in a lottery not authorized by our law.—5 Johns. 326 ; 2 A. K. Marsh. 137 ; *ib.* 209.

RICE, J.—Section 3254 of the Code is in the following words :

“Any person setting up, or concerned in setting up, or carrying on any lottery, without the legislative authority of this State, must, on conviction, be fined not less than one hundred, or more than two thousand dollars.”

The form of an indictment under this section, is given on page 707 of the Code. That form has been followed in this case ; and the indictment is sufficient.—*The People v. Sturdevant*, 23 Wend. Rep. 418 ; *Commonwealth v. Dana*, 2 Metc. Rep. 329.

It is a sound principle, “that no person be adjudged guilty of an offence, unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. It is more consonant to the principle of liberty, that a court should acquit when the legislature intended to punish, than that it should punish when it was intended to discharge with impunity.”—*The Schooner Enterprize*, 1 Paine’s Rep. 32 ; *Smith’s Com. on Statutes*, 861, § 747.

But there can be no doubt, that any person who sells, in this State, any lottery ticket, for or on behalf of any agent, conductor, manager, or proprietor of any lottery which has been set up in this State, a sister State, or a foreign State, “without the legislative authority of this State”, and the prizes in which, at the time of the sale of the ticket, have not been actually distributed, is concerned in carrying on a lottery “without the legislative authority of the State”, and a violator of section 3254 of the Code. In the consideration and trial of an indictment found under this section, the laws of a sister State, or of a foreign State, authorizing lotteries to be set up and carried on, have no force whatever. Such laws cannot, upon the principle of comity, or upon any other



principle, be regarded as impairing or annulling any provision of our criminal code, or as conferring upon any person authority to violate with impunity any provision thereof. *Commonwealth v. Burns*, 4 J. J. Marsh. Rep. 177; *Commonwealth v. Dana*, *supra*; *The People v. Sturdevant*, *supra*.

Any other construction of section 3254 of our Code, would fall little short of a repeal of at least one of its material provisions, and would permit the proprietors, managers, and agents of the authorized lotteries of every State and sovereignty on earth, with impunity, to offer and sell in this State all their tickets. The legislature certainly knew that there could not be a "carrying on" a lottery, without the sale of tickets, which means the sale of chances. The manifest design of the section was, to suppress, within the limits of this State, all lotteries not authorized by our own statute law; and to prevent (among other things) the sale of any tickets in such lotteries, and thus destroy the evils resulting from that species of gambling.

The proposition asserted in the first charge given by the court, is, that proof that the defendant is *the agent* of the persons carrying on any lottery not authorized by our statute law, makes out the case for the State. This charge cannot be sustained. It relieved the State from proving that, within one year before the finding of the indictment, the defendant had done an act *in the county* in which the indictment was preferred, which amounted to a violation of section 3254 of the Code. Although he was agent, yet, if he had done no act, nor participated in any, contrary to law, in *the county* in which the indictment was preferred, within one year next before it was preferred, he ought not to have been convicted. Code, §§ 3374, 3514.

For the error in the first charge of the court below, above pointed out, its judgment is reversed, and the cause remanded.

## DALE AND UNDERWOOD vs. THE STATE.

[INDICTMENT FOR GAMING.]

1. *Room in second story, rented and occupied as sleeping apartment, not necessarily within prohibition of statute, because lower story is used by another for sale of spirituous liquors.*  
A room on the second floor of a two-storied house, rented and occupied by the defendant as a sleeping apartment, is not brought within the prohibition of the statute, by the mere fact that the lower story is used by another person for the sale of spirituous liquors.

FROM the Circuit Court of Marengo.

Tried before the Hon. ROBERT DOUGHERTY.

THIS indictment was found at the Fall term, 1854, against Thomas J. Dale, Berry G. Underwood, Edward F. Martineer, and William Mobley, and was in the general form allowed by the Code. Mobley was not taken, and a *nolle pros.* was entered as to Martineer; the other two defendants were tried jointly, and were convicted. The bill of exceptions states, that the State proved, on the trial, "that the defendants played cards in the said county of Marengo, within twelve months before the finding of the indictment, in a room used and occupied solely by defendant Dale as a sleeping room; that said room was one of three rooms in the second story of a house in the town of Demopolis; that said house was rented at the time by one Martineer, and said room in which the playing took place had been rented by said Martineer to said Dale, who, at the time of said playing, was occupying it. It was in proof, also, that said Martineer used the lower story of said house as a family grocery; that in said house he kept and sold spirituous and vinous liquors, but not by retail; and that the playing took place when he so kept the house, and sold vinous and spirituous liquors, &c. On this state of facts, there being no conflict in the proof, the court charged the jury, that, if they believed the evidence, they must find the defendants guilty; to which charge the defendants excepted," and they now assign it for error.

No counsel appeared for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

GOLDTHWAITE, J.—If it be conceded that if the defendant had played in the lower story of the house he would have been guilty under the law (Code, § 3243), it does not follow that playing in a different part of the same house would necessarily, and under all circumstances, fall within the section referred to. If separate parts of the same building were disconnected, and appropriated to distinct and separate uses, it would be the same, in law, as if they were two buildings, so far as this offence is concerned ; and where the playing takes place in a room, rented and occupied by one person for a sleeping apartment, in the second story of a house, the fact that the first story is used by another person to sell vinous and spirituous liquors in, does not, of itself, make the part which is appropriated to such separate purpose partake of its character, so as to warrant a conviction of either of the offences in the indictment.

Judgment reversed, and cause remanded.

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### LONG vs. THE STATE.

[INDICTMENT FOR RETAILING SPIRITUOUS LIQUORS WITHOUT LICENSE.]

1. *License laws not revenue measures.*—The several provisions of the statutes of this State authorizing licenses to retail, are not merely revenue laws : the payment of the prescribed tax, is only one of the pre-requisites to obtaining a license, and the other provisions of the statute (as to producing certificate, giving bond, and taking oath prescribed) show that the legislature considered it a dangerous privilege, the abuse of which they were intended to guard against.
2. *License to one partner no authority to co-partner or partnership.*—Although a license may be granted to a partnership, upon each partner complying with the requisitions of the statute as to certificate, oath, &c.; yet a license to one partner individually confers no authority upon his co-partners or the firm.

FROM the Circuit Court of Butler.

Tried before the Hon. C. W. RAPIER.

THIS indictment, which was found at the Fall term, 1854, was in the general form prescribed by the Code (§ 1059) for "retailing spirituous liquors without a license." On the trial, the State introduced evidence "tending to show that the defendant retailed in the town of Greenville in said county, between the 24th March, 1854, to within a few days of the Fall term of the Circuit Court. The defendant then showed by evidence, that in December, 1853, one Isaac Y. Smith obtained from the Probate Court of Butler a license, in due form, authorizing him to retail in the town of Greenville for twelve months from the issuance of said license; that said Smith, soon after obtaining license as aforesaid, commenced retailing, and continued to do so until the 24th March, 1854; that at this period the defendant purchased from said Smith the larger interest in his retailing establishment, the whole capital being less than \$500, and said Smith retaining an interest therein to the extent of \$137; that said defendant, from the time of his said purchase until shortly before the Fall term of said court, 1854, personally conducted the business of the establishment, supplying it with liquors from the profits of the concern, and retailing them out, and was interested in the profits in proportion to his interest in the establishment; that said Smith, from the time of the sale to defendant, had no ostensible connection with the establishment, but continued interested therein as a partner to the extent of the interest he had retained, until shortly before the Fall term of said court, 1854; and that while the defendant was such partner of Smith, the retailing proved by the State took place. The proof showed, also, that the only retailing done by the defendant, between said 24th March, 1854, and shortly before said Fall term of said court, was done in the town of Greenville, in the house which had been and was occupied by said Smith, the partner of said defendant, at the time the partnership began, and at but one place in said town. There was no proof showing the number of inhabitants in said town of Greenville."

"Upon this proof, the court charged the jury, that if they found the facts as herein set forth, the defendant was guilty, and, if guilty, they must assess a fine of at least thirty dollars against him." The defendant excepted to each part of this charge, and he now assigns the same for error.



WATTS, JUDGE & JACKSON, for the appellant :

Smith's license authorized him to retail at one place in the town of Greenville, either by himself, or through a clerk or agent, for the term of one year. It certainly cannot be contended, that a licensed retailer cannot lawfully employ a clerk or agent to vend his liquors. But each partner is the agent of the other, in all business within the scope of the partnership: each act of retailing by the defendant, was, at the same time, the act of Smith. It was certainly a legal act in Smith, and it must be equally a legal act in Long; for the same act cannot, at one and the same time, be both legal and illegal. This is not the case of a sale or transfer of a license. Each act of the defendant in selling, was also the act of Smith, for which, but for his license, Smith might have been indicted. To say that Long is liable because, by virtue of the partnership, he is principal with Smith as well as agent, involves this absurdity: Long acts both as principal and agent; each act, as agent, is lawful, but at the same time, as principal, unlawful.

M. A. BALDWIN, Attorney General, *contra*:

The statute does not deem every one a fit person to be entrusted with the dangerous privilege of selling spirituous liquors. It requires each applicant for a license to produce a certificate of good moral character, to give bond, and to take and subscribe a stringent oath; and it confines the privilege "to the person alone to whom the license is granted." Code, §§ 398, 1056, 1057. The right to retail, thus conferred, is a personal trust, and cannot be delegated or transferred. Commonwealth v. Branamon, 8 B. Mon. 374; Godfrey v. The State, 5 Blackf. 151; Lewis v. The United States, 1 Morris (Iowa) 199.

RICE, J.—Section 398 of the Code expressly declares, that a license for retailing must be confined to one place only in the county, and "*to the person alone to whom the license is granted.*"

Section 1056 declares, that no such license must be granted, "unless the applicant produce to the judge of probate of his county the recommendation of six respectable freeholders or



householders thereof, residing within five miles of such applicant, stating that they are acquainted with him, that he is possessed of a good moral character, and in all respects a proper person to be licensed."

Section 1057 provides, that "the applicant must also, before obtaining his license, take and subscribe the following affidavit: "I do solemnly swear, that I will not sell any vinous or spirituous liquor to, or sell to, or purchase from, any slave, any article or commodity, without the permission of the owner, master, or overseer, of such slave; and that I will not knowingly suffer the same to be done by my partner, clerk, agent, or any other person, upon or about my premises, *if in my power to prevent the same*; and further, that I will not allow any gaming of any kind to be carried on, on or about my premises, *if in my power to prevent the same*."

Section 397, makes the additional requisition, that the applicant for a license to retail in a city, town, or village having less than five hundred inhabitants, shall pay as State tax thirty dollars, before obtaining his license; and requires a higher price as State tax to be paid for a license to retail in a city, town, or village having a larger number of inhabitants.

Section 399 provides, that on a conviction for selling spirituous or vinous liquor without a license, the person convicted must be fined not less than the State tax, as fixed in section 397, for such license, and may be imprisoned by the court, not exceeding sixty days.

Section 1060 declares, that no person must obtain a judgment in any court of this State, upon any account, *any item of which* is for vinous or spirituous liquor in less quantities than one quart, without producing to the court a license *showing his authority to retail* at the date of such item.

Section 1 declares, that the singular includes the plural, and the plural the singular.

Section 1058 defines the meaning of retailers and retailing.

The foregoing are the only provisions of our statute law, which we think have any bearing on the questions to be decided in the present case; and looking at all these provisions together, we think it clear, that the law authorizing licenses to retail, is not merely a revenue measure. The payment of

the prescribed tax, is only one of the pre-requisites to obtaining such license. The other pre-requisites show that the legislature deemed the privilege of retailing so dangerous, that it was not to be entrusted to any person, until he was properly recommended, nor even to such person, until he became bound by oath in writing to perform the obligations set forth in the prescribed affidavit.

We concede that a license may be granted to a partnership, upon a compliance with the law by its members. No greater amount would have to be paid for such license, than for a license to a single individual. Yet, before it could lawfully be granted, it would be necessary that *each member* of the firm should produce the prescribed recommendation, and take and subscribe the prescribed affidavit. We also concede, that when a license has been granted to an individual, he may exercise the privilege it confers, by his clerk, or agent; for the acts of his clerk, or agent, are, in law, his acts, and nothing more. And so, when a license has been granted to a partnership, the firm may exercise the privilege it confers, by its clerk, or agent; for the acts of its clerk, or agent, are, in law, its acts, and nothing more. The clerk, or agent, is entirely under the control and superintendence of the principal. But one partner is not the mere clerk, or mere agent, of his copartner, nor entirely under his control and superintendence. Each partner has rights and powers, and is subject to responsibilities, which do not attach nor appertain to a mere clerk or agent.

A license to retail affords protection only for those acts, which, in law, are merely the acts of the person to whom it was granted. If it is granted to an individual, it affords protection only for those acts which, in law, are merely his acts as an individual. If it is granted to a partnership, it affords protection only for those acts, which, in law, are the acts of the firm. A license to an individual cannot be a license to a partnership.

This construction allows some effect to each of the various provisions of the Code above cited; and any other construction would annul the explicit declaration, contained in section 398, that a license to retail shall be confined "*to the person alone* to whom the license is granted."

The evidence in the present case shows, that Long was not the mere agent or clerk of Smith, but that in retailing he acted *as the partner* of Smith, and was in fact *such partner*. If the acts of Long can be regarded as binding upon Smith, it is only because they are the acts of *the firm*. They are *not the mere acts of Smith*, but are either the acts of Long alone, or of the firm. Suppose Long retailed on a credit, and should sue upon an account for the liquor thus retailed, either in his own name or in the name of the firm; and suppose the defendant in that suit should rely for his defence on the provisions of section 1060 of the Code, above cited; it is clear, the defence in that case would be good, because the license does not show any authority to retail, either in Long, or in the firm of Smith & Long.

We are satisfied that there is no error in either of the charges of the court below. The correctness of the last charge is manifest from the mere reading of sections 397 and 399 of the Code above referred to.

The judgment is affirmed.

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## FRANK ET AL. (SLAVES) vs. THE STATE.

[INDICTMENT AGAINST SEVERAL SLAVES FOR THE MURDER OF ANOTHER SLAVE.]

1. *Admissibility of defendant's declarations.*—On the trial of several slaves under an indictment for the murder of another slave, a witness for the State (one B.) testified, that he came up with the defendants immediately after the fight, going towards the house of one W.; that one of them was bleeding profusely from a wound on the back of his head; that on his inquiring how it happened, Frank gave him a false account of the fight, and said that the deceased (who had gone off wounded, and afterwards died from the effects of the wounds) was not much hurt, and had gone home, “and witness said that he evidently tried to conceal the fact that any serious hurt had been done to any one in the fight;” that he continued the conversation until he got to W.’s house, and witness then went in and brought W. out into the yard where the negroes were. W. was afterwards introduced as a witness by the prisoners, and testified, that he came out immediately upon B.’s going into the house, and that B. came back into the yard with him; “and the prisoners then of-

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ferred to prove by him, that when he came out, Frank, in reply to questions propounded by him, made a full and fair statement of all that occurred in the fight—the wounds which he had inflicted upon the deceased, the manner in which the fight had been brought about, and the way in which he had been wounded.” *Held*, that these declarations were admissible evidence for the prisoners, being a continuation of the conversation commenced with B., although he did not hear them, and tending to rebut the truth of his statement that Frank evidently tried to conceal the true facts of the case.

2. *Conspiracy—Liability of each for act of others.*—*Whether act was done in prosecution of common purpose, is a question for the jury, and charge excluding it is erroneous.* If several persons conspire to do an unlawful act, all are responsible for the acts of each, if done in prosecution of their common purpose; but if an offence is committed by any one of them, from causes having no connection with the common object, he alone is responsible for its consequences. In such cases, it is a question for the jury, whether the act was done in prosecution of the original unlawful purpose, or was independent of it and without previous concert; and a charge which excludes this question from their consideration, is erroneous.
3. *Participation in attack preconcerted by others, not murder.*—If A. and B., by preconcert, make an attack on C., in which D., not being privy to their common design, participates; this will not be murder in D., if death ensues from wounds inflicted by either A. or B.

FROM the Circuit Court of Benton.

Tried before the Hon. THOMAS A. WALKER.

THE appellants, Frank, Jerry and Trussvan, with four other slaves, were indicted at the Spring term, 1855, of the Circuit Court of Benton, for the murder of another slave named La Fayette, otherwise called Fayette, and were tried at the same term. The State, on the trial, introduced evidence tending to show that the deceased was mortally wounded by Frank with a knife, in a fight which occurred late in the evening of the Sabbath, in Benton county, not far from the house of Mrs. Woodruff; that during the fight Frank's hand was cut, and Jerry was wounded in the back of his head; and that each of the prisoners participated, with malice, in the difficulty. The State then introduced Mr. Bruton as a witness, who testified as follows: “That on the evening of the difficulty, hearing the noise, and being not far from where the fight occurred, he went up there; that he got there just after the fight had closed, but that Fayette was gone; that he met Jerry and Frank, going towards Mrs. Woodruff's, and that Jerry was bleeding profusely from the wound in the back of



his head ; that he asked Frank how it happened, and Frank said, that Joe had held Jerry, and Fayette had stabbed him while he was holding him, and that he (Frank) had got his hand cut by pulling the stick off the spear in the scuffle ; that Frank also said, that Fayette was not hurt much, and that he had gone home ; and the witness said, that Frank evidently tried to conceal the fact that any serious hurt had been done by any one in the fight. He further testified, that he continued the conversation until he got to Mrs. Woodruff's, and then witness went in, and brought her son (Calvin Woodruff) out to where the negroes were in the yard."

During the further progress of the trial, the prisoners introduced said Calvin Woodruff as a witness, and, after proving by him that he came out immediately upon Bruton's going into the house,—that Bruton came back into the yard with him, that the prisoners were in the yard, and the house but a few steps off,—“ offered to show by him that, when he came out, Frank, in reply to questions propounded by witness, made a full and fair statement of all that occurred in the fight—the wounds which he had inflicted upon the deceased, the manner in which the fight had been brought about, and the way in which he had been wounded. This conversation of Frank's with Woodruff, Bruton did not hear. The counsel for the State objected to this proof ; the court sustained the objection, for the reason, that this was a different conversation ; and the defendants excepted. This proof of the witness Woodruff was then offered, to rebut the idea that Frank, in the conversation with Bruton, concealed and kept back from him the circumstances connected with the fight ; but the evidence was ruled out for any purpose, and the defendants excepted.”

Among the several charges requested by the defendants, one (the fourth) was in these words : “ If Trussvan struck Fayette while he and Jerry were fighting, and Frank afterwards stabbed Fayette, and killed him, without any preconcert on the part of Trussvan and Frank or Jerry, to kill Fayette, or to fight him, then Trussvan is not guilty of murder.” To this request for instructions the court responded as follows : “ The shape which this charge is asked, I will have to give it, but I must explain it to the jury. If the

assault was made by Jerry, and Fayette was forced into the fight, and Trussvan struck with a pine knot and knocked Fayette down, and while on the ground Frank stabbed him and killed him ; and there was no preconcert on the part of Trussvan, with Frank or Jerry, to kill Fayette, or to fight him,—then Trussvan would not be guilty of murder, but would only be guilty of manslaughter. On the other hand, if the assault was made by Fayette on Jerry, and Fayette was in fault ; and while they were fighting, Trussvan struck Fayette, without any preconcert with Jerry or Frank to kill or fight Fayette,—then Trussvan is not guilty of either murder or manslaughter. But, if the jury are of the opinion, from all the proof, that there was a preconcerted plan between Jerry and Frank to assault with malice and to beat Fayette, and Jerry made the assault, and attacked him with malice, and while Fayette was retreating Trussvan knocked him down with a pine knot, and while down Frank stabbed him, and killed him,—then Trussvan is guilty of murder, and so are Jerry and Frank guilty of murder.” To the refusal to give this charge as asked, and to the qualification given, the defendants severally excepted.

The bill of exceptions sets out numerous other rulings of the court, to which exceptions were saved ; but, as they are left undecided by the court, it is unnecessary to state them here. The rulings above stated, among others, are now assigned for error.

A. WHITE and G. C. WHATLEY, for the appellants :

1. The evidence of Calvin Woodruff, as to what Frank said to him, ought to have been admitted. It was the continuation of the conversation to which Bruton had testified : it was upon the same subject, and had at the same time ; and part of it having been introduced by the State, the defendants were entitled to the residue. It was clearly competent to rebut the testimony of Bruton, who had deposed that “ Frank evidently tried to conceal ” the facts, by proving that he immediately afterwards made a full and candid disclosure of all the circumstances attending the fight. The prisoners had been prejudiced, in the minds of the jury, by this statement of Bruton’s, and they should have been allowed to correct the

erroneous impression. The testimony was not offered as evidence of the facts stated, but only to rebut or disprove the evidence of Bruton that Frank wished to conceal the facts. *Oliver v. The State*, 17 Ala. 587; *Harris v. Taylor*, 13 *ib.* 324; *Bush v. Bradford*, 15 *ib.* 323.

2. The manner in which the fourth charge was given, entirely emasculated it—took from it all weight in the minds of the jury. It was equivalent to saying to the jury, I do not wish to give this charge, but there is something in the shape of it—some art or trick about it—which compels me, reluctant though I am, to give it. The qualification was erroneous, also, because not explanatory of the charge itself. The Code (§ 2355), adopting the practice settled by several decisions of this court, declares that a party has the right to have a charge given or refused in the language in which it is asked; and the construction placed upon this statute in *Morris v. The State*, 25th Ala. 57, gives the court power “to simplify and explain the charge asked and given, by such additional instructions as will prevent a misunderstanding or misapplication of it.” But the qualification, when given as a qualification, must be in some sense explanatory of the charge: to allow the court to give an independent, disconnected charge, under the mere form of a qualification, would, in effect, destroy all the benefits intended to be secured by the statute. On this point, see *Morris v. The State*, 25 Ala. 57; *The State v. Wilson*, 2 Scam. 225; *Cothran v. Moore*, 1 Ala. 423.

The qualification to this charge is also erroneous in substance. It asserts two incorrect legal propositions: 1st, that a mere preconcert to fight Fayette, without any preconcert to kill him, would make Trussvan guilty of murder; and, 2d, that if there was a preconcert, on the part of Jerry and Frank, “to assault with malice, and to beat Fayette, and if an attack was made by Jerry upon Fayette with malice, and Trussvan, while Fayette was retreating, knocked him down with a pine knot, and Frank stabbed him while down, and killed him,—then all three would be guilty of murder.” There was no evidence whatever of any preconcert among the prisoners; and to direct the minds of the jury to such preconcert, as a fact which might be inferred from the evidence, was error.—*Montgomery v. Evans*, 8 Geo. R. 178;

Hanson v. Thompson, 9 *ib.* 310 ; Murray v. The State, 18 Ala. 727 ; Snyder v. Witt, 15 Penn. 59. A mere agreement, on the part of Jerry and Frank, to assault and beat Fayette, would not make it murder in them, if Jerry afterwards assaulted him, and in the fight Frank killed him. The charge limits the design to beating Fayette ; and if Fayette fought willingly, and the intention was only to beat him, and not to kill him or do him great bodily harm, it would have amounted to no more than manslaughter.—Archbold's Criminal Evidence, vol. 2, pp. 230 to 232 ; *ib.* 250, n. 1 ; *ib.* 252, n. 3. This charge makes Trussvan guilty of murder, without any preconcert or knowledge on his part of the felonious intent, if the assault was preconcerted between Jerry and Frank, and Jerry assaulted Fayette with malice.—Roscoe's Criminal Evidence, p. 213 ; 1 Hale's P. C. 466 ; Wharton's Criminal Law, p. 29.

M. A. BALDWIN, Attorney General, and J. B. MARTIN, *contra*.

RICE, J.—(After stating the evidence above recited.) Frank is a slave ; Messrs. Bruton and Woodruff are white men. Just after the fight, Mr. Bruton met Frank. What Frank said to him, was *begun* by his inquiring, "how it happened." The conversation *continued* until they got to the house of Mrs. Woodruff, and Mr. Bruton went in, leaving the negroes in the yard. The evidence does not show that the conversation had *ended* when Mr. Bruton went into the house. Upon his going into the house, Mr. Woodruff *immediately* came out *with him* into the yard where the negroes were, when Frank, in reply to the inquiry of Mr. Woodruff, made the full and fair statement offered in evidence by the prisoners and rejected by the court. Although the evidence shows that Mr. Bruton "did not hear" the statement made by Frank to Mr. Woodruff, yet it does not show that Mr. Bruton left Mr. Woodruff, or the yard, before said statement was made, nor that Mr. Bruton did not remain in the yard with Mr. Woodruff, nor that he was not present, and in full view of Frank, whilst Frank was making the statement to Mr. Woodruff. The statements made by Frank to Mr.



Bruton and Mr. Woodruff, related to the same subject ; and the statement to the one followed the statement to the other, without any other pause or interruption than was produced by Mr. Bruton's going into the house and bringing out Mr. Woodruff, and in as quick and immediate succession as the relation of white men to a slave and their dominion over him would allow under such circumstances as are here disclosed by Messrs. Bruton and Woodruff.

We do not question the honesty of Mr. Bruton, in the expression of his opinion, that " Frank evidently *tried to conceal* the fact that any serious hurt had been done by any one in the fight." But conceding his honesty, he may be mistaken in this opinion. If he is mistaken, his mistake is prejudicial to Frank. His testimony made it a material question, whether, in fact, Frank had *this intent to conceal*, which Mr. Bruton honestly thinks he had. This question was for the determination of the jury. It was the right of Frank to lay before them every circumstance, connected with his statement to Mr. Bruton, which could aid them in coming to a conclusion upon this question of intent. He should not have been confined to what appeared in Mr. Bruton's testimony, but should have been permitted to submit to the jury the testimony which was offered by the prisoners and rejected by the court, as the same is hereinabove set forth. In rejecting the testimony thus offered, the court below erred.—The State v. Curtis, 12 Iredell's Rep. 270 ; United States v. Craig, 4 Wash. C. C. Rep. 730 ; Barthelemy v. The People, 2 Hill (N. Y.) R. 248 ; Cornelius v. The State, 7 English's Rep. 783 ; 1 Starkie on Ev. 46 to 48 ; 2 Waterman's Arch. Cr. Pl. 212-13.

If several persons conspire to do an unlawful act—an act *malum in se*—all the members of such illegal combination are responsible for the acts of each, *done in prosecution of their common purpose*. If, however, an offence is committed by one or more of them, from causes having no connection with the common object, the responsibility for such offence attaches exclusively to its actual perpetrators. In such cases, it is a question *for the jury*, whether the act done was in prosecution of the purpose for which the party had assembled or confederated, or was independent of it, and without any previous

concert.—1 East's Crown Law, 255 to 260, §§ 31 to 35 ; 2 Waterman's Arch. Cr. Pl. 211-1 to 211-4 ; Thompson v. The State, 25 Ala. Rep. 41.

This question was excluded from the consideration of the jury, by the last sentence of the fourth charge given by way of qualification. In thus excluding this question from the consideration of the jury, the court below clearly erred as to Trussvan and Jerry.

This charge is palpably erroneous as to Trussvan, for another reason. It makes him guilty of the murder of La Fayette, without any agreement or preconcert with Jerry or Frank, and merely because he knocked La Fayette down with a pine knot while retreating from Jerry's assault, although this knocking down did not produce death, and although Frank killed La Fayette by stabbing him after he was knocked down. Even where death ensues in consequence of an unlawful act not felonious, though the law may not consider the man innocent, it endeavors to measure the nature and degree of punishment by the degree of real guilt.—2 Waterman's Arch. Cr. Pl. 211-1.

We have already pointed out errors which compel us to reverse the judgment of the court below, and to remand the cause ; and we shall place the reversal upon the grounds above set forth. But we wish it distinctly understood, that we do not commit ourselves upon the other questions presented by this record. They may not arise on another trial, and we decline their consideration at this time.

Judgment reversed, and cause remanded.

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## THE STATE vs. BRANTLEY ET AL.

[SCIRE FACIAS ON FORFEITED BAIL-BOND.]

1. *Duress of imprisonment of principal discharges bail.*—To scire facias on forfeited recognizance, it is a good plea by the sureties, that their principal, at the time of its execution, "was illegally and by force imprisoned and restrained

of his liberty, and that under such illegal and forcible imprisonment and restraint of his liberty, and to procure a release and discharge from such forcible and illegal imprisonment and restraint of his liberty, defendants made and subscribed said writing."

2. *On issue joined on several pleas, of which one is good, defendants are entitled to judgment on verdict finding "the issues" for them.*—Where issue is joined on several pleas in bar of the action, one of which is good, and the jury by their verdict "find the issues in favor of the defendants", the defendants are entitled to judgment; and if the court erred in overruling demurrers to the other pleas, it is error without injury, which will not reverse the judgment.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. GEORGE D. SHORTRIDGE.

SCIRE FACIAS on a forfeited recognizance, against Henry S. Brantley and his sureties, of whom the latter only were served with process. The sureties appeared, and filed seven special pleas in answer to the *scire facias*, of which the second plea was as follows:

"2. That the writing sued on is not their lawful writing, and is not binding on them, as they are advised and believe, because they say that, on the 20th day of June, 1853, and at the time of the execution of the said writing, the said Henry S. Brantley was illegally and by force imprisoned and restrained of his liberty, and that under such illegal and forcible imprisonment and restraint of his liberty, and to procure a release and discharge from such illegal and forcible imprisonment and restraint of his liberty, the said defendants made and subscribed the said writing sued on."

The State demurred to all the other pleas, and the demurrer was sustained as to the first, sixth, and seventh, and overruled as to the others. The defendants then withdrew their fifth plea, and the State filed two replications to the fourth plea, both of which were demurred to, and the demurrer sustained. A trial was then had on issues joined on the second, third, and fourth pleas, and the jury returned a verdict finding "the issues in favor of the defendants;" and thereupon judgment was rendered that they go hence, &c.

No errors are assigned on the record.

M. A. BALDWIN, Attorney General, and P. T. SAYRE, for appellant.

WM. M. MURPHY and JOHN T. MORGAN, *contra*.

RICE, J.—If the truth of one good plea in bar of the action is duly established by verdict, the defendant is entitled to judgment, although all his other pleas are both bad and false.—Barber v. Dixon, 1 Wilson's Rep. 44 ; Firemen's Insurance Co. of Mobile v. Cochran & Co., at the present term ; Worford v. Isbel, 1 Bibb's Rep. 247.

In the present case, the jury found all the issues (including the issue on the second plea) for the defendants. That plea was not demurred to, and no error has been committed by the court below in relation to it. That plea is good, and the proof of its truth absolutely destroys the plaintiff's action. Watkins v. Baird, 6 Mass. R. 506 ; Thompson v. Lockwood, 15 Johns. R. 256 ; 2 Greenl. Ev. § 302.

As the court below committed no error in relation to that plea, we are not authorized to deprive the defendants of the benefit of the verdict establishing its truth, merely because the court below may have committed errors in its rulings as to other and independent pleas. If there was error in overruling the demurrers to the third and fourth pleas, such error had no connection with and no influence upon the second plea, nor did it contribute in any way to the proof of the truth of that plea. We do not here allow to the defendants any benefit from their third and fourth pleas. We consider those two pleas as, in effect, stricken out of the record. The verdict ascertaining the truth of the second plea is sufficient, *per se*, to sustain the judgment for the defendants.

If the verdict had been general for the defendants, and had not shown affirmatively that the jury found "*the issues* in favor of the defendants", it is possible we might have held that we would not interpret the verdict as finding *all the issues* for the defendants ; and that, therefore, the error in any of the rulings of the court as to the third and fourth pleas, would be ground of reversal, if indeed such error was found to exist. But as the verdict shows clearly that the jury found the issue on the second plea, as well as the issues on the other pleas, in favor of the defendants, the rulings of the court as to the third and fourth pleas, even if erroneous, constitute no ground of reversal ; because there was no error committed by the



court as to the second plea, and the finding of the truth of that plea, *per se*, absolutely destroys the plaintiff's action.

We do not decide whether there was error in the rulings of the court as to the third and fourth pleas, or as to the replications to the fourth plea. If there was, it is error from which it is clear no injury resulted to the plaintiff.

The judgment is affirmed.

## BROWN vs. THE STATE.

### [INDICTMENT FOR GAMING.]

1. *Charge dispensing with proof of venue, erroneous.*—Where the evidence, as set out in the bill of exceptions, did not show that the venue was proved; and “upon this state of facts, the court charged the jury, that if they believed the evidence, they must find the defendant guilty:” *Held*, that the charge was erroneous, because it authorized the jury to find the defendant guilty without any proof that the offence was committed in the county in which the indictment was preferred; and for this error the judgment of conviction was reversed, and the cause remanded.
2. *Country store-house is a public house, and prima facie an entirety.*—A store-house in the country is a public house, within the meaning of the statute against gaming, (Code, § 3243); and if it consists of two rooms, one above the other, and the owner controls both, while he uses the lower room as his store, the upper room also is within the prohibition of the statute, unless it affirmatively appears that it is not used as an appendage to the store, nor in the prosecution of its business, nor in connection with the store for the convenience and accommodation of the owner, his employees or customers, but is occupied for some justifiable private purpose, entirely disconnected from the business of the store, or the convenience of the customers.

FROM the Circuit Court of Barbour.

Tried before the Hon. NAT. COOK.

THE appellant and three other persons were indicted at the January term, 1854, of the Barbour Circuit Court, for gaming; the indictment being in the general form allowed by the Code.—See Form No. 69, p. 707. On the trial of the case, “the State proved, that the defendants played a game of

cards ; that the place where said playing took place was in a room over a country store ; that said room was entered on the outside by steps, and was disconnected from the store ; that the furniture of said room consisted of some chairs and a mattress ; it was sometimes used as a sleeping place by the proprietor of the store, who kept the key of said room ; that no goods of any description were kept or sold in said upper room, but that sometimes, when the store was crowded, persons who wished to adjust their accounts in private went up, by special permission, for that purpose ; but that such persons never went up while the defendants, or any other persons, were playing cards there. It was shown that goods and merchandise were sold in the store beneath, but not that any spirituous liquors were sold or given away there. When the playing took place, the door of the upper room was closed and locked, and nobody was allowed to enter, except upon being recognized and approved, nor could anybody enter without permission ; all others were refused admission. It was not shown that there was any passing in or out of said room during said playing, except that one witness swore that he knocked at the door, and, upon making himself known, was allowed to enter. Only four or five persons were present at the playing, which took place with the assent of the proprietor, who furnished the defendants with the key for that purpose. It was shown, also, that persons playing in said upper room could not be seen from the road, nor from the outside, and that there was no communication between the store and said upper room, by door or otherwise.

“ Upon this state of facts, the court charged the jury, that the place where the playing took place was a public house, within the meaning of the statute, and that, if they believed the evidence, they must find the defendant guilty.” To this charge the defendant excepted, and he now assigns it for error.

E. C. BULLOCK, for the appellant, contended,—

1. That this case is not covered by *Johnson v. The State*, 19 Ala. 527, where a room similarly situated was held within the prohibition of the statute ; because, there, the decision was made to rest on the fact that spirituous liquors were

retailed in the lower room, and the object of the statute was to disconnect gaming from tippling houses ; but here, "it was not shown that spirituous liquors were sold or given away" in the lower room.

2. That it is not covered by either of the cases decided at the last term—*Windham v. The State*, 26 Ala. 70, and *McCauley v. The State*, *ib.* 135. The room where the playing took place was entirely disconnected from the store beneath it. The store itself, like the warehouse room and the lawyer's office, was a public house, to which the public might go as matter of right ; but the room above was a private house, to which they could not go without special permission. Suppose a lawyer or merchant has his office or store in the lower story, while the family of another person resides in the second story ; could it be contended that the entire building was a public house, and that the upper room was within the prohibition of the statute ? Suppose the family of the lawyer or merchant himself resides in the upper room ; does it thereby lose its private character, and become a public house ? Suppose the lawyer or merchant is an unmarried man, and has a private establishment over his office or store ; does not the same principle still apply ? can he be denied the sanctity of private life, in another part of the house, because he happens to keep an office or a store ? The character of the room—its privacy or publicity—must be determined from the uses to which it is applied, and from them alone.

M. A. BALDWIN, Attorney General, *contra*, contended that the charge of the court was fully sustained by the principles laid down in *Windham v. The State*, 26 Ala, 72, and *Johnson v. The State*, 19 *ib.* 527 ; and he also cited *Commonwealth v. Saunders*, 5 Leigh's R. 751 ; *State v. Terry*, 4 Dev. & Bat. 186.

RICE, J.—The charge is erroneus, because it authorized the jury to find the defendant guilty, without any proof that the offence had been committed in the county in which the indictment was preferred.—Code, § 3514 ; *Rowland v. Ladiga*, 21 Ala. R. 9.

For this error, we are bound to reverse the judgment,

whether there is error in any other particular or not. As the case must be remanded for another trial, we deem it proper, in view of the facts shown in the bill of exceptions, to state, explicitly, that we do not intend to depart from or impair the decisions of this court made in *Johnson v. The State*, 19 Ala. R. 527, and in *Windham v. The State*, 26 *ib.* 69.

One of the plain results of those decisions is, that a store-house in the country is a "public house", within the meaning of section 3243 of the Code. Another is, that where the house consists of two rooms, one over the other, and the owner controls both, and uses the lower room as his store, the upper room is within the prohibition of said section, unless it affirmatively appears that it is not used as an appendage to the store, nor in the prosecution of its business, nor in connection with the store for the mere convenience or accommodation of the owner, his employees or his customers, but is occupied for some justifiable private purpose entirely disconnected from the business of the store or the convenience of its customers.

A house consisting of two rooms, one above the other, under the control of one and the same person, is, *prima facie*, an entirety. If the lower room is a "public house" within the prohibition of said section, the upper room is, *prima facie*, within the prohibition. Proof that the lower room is a "public house", raises the presumption that the upper room is within the prohibition; yet this presumption is not *conclusive*, but may be overthrown by proof that it is not consistent with the real truth of the case.

For the error above mentioned, the judgment is reversed, and the cause remanded.



POWELL *vs.* THE STATE.

[INDICTMENT FOR SELLING SPIRITUOUS LIQUORS TO A SLAVE.]

1. *Delivery to slave presently, on verbal order of overseer, and for his use, not within the statute.*—If the overseer of a slave goes to a house where spirituous liquors are sold, and tells the keeper that he will send the slave for a specified quantity of a particular quality, and goes off and sends the slave with a jug for the same; and thereupon the keeper puts it in the jug, and delivers it to the slave—this is not a sale, gift, or delivery to the slave, within the meaning of section 3243 of the Code, and is lawful without an order in writing.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. EDMUND W. PETTUS.

THIS indictment charged, that the defendant, James Powell, “before the finding of this indictment, sold, gave, or delivered to a slave named John, belonging to Berry Pippin, vinous or spirituous liquors, without an order in writing, signed by the overseer or master of such slave, specifying the quantity to be sold, given, or delivered; against the peace,” &c.

The bill of exceptions states that “the evidence tended to show that the defendant, on several occasions, a few weeks before the finding of the indictment, delivered spirituous liquor to the slave John named in the indictment, under the following circumstances: One Whitesides, who was the overseer of said slave, and at work with him in a stable for stage horses, would go to the house where the defendant kept spirituous liquors for sale, and tell defendant that he would send the said slave for some spirituous liquor, naming the quantity and quality; that when said Whitesides returned to the stable, at some distance from defendant’s house, he would send said slave with a jug after the quantity of spirituous liquor for which he had spoken to defendant; and defendant would put the spirituous liquor in the jug, and deliver it to said slave. The time and venue were proved, and the ownership of the slave as charged; but there was no evidence of any order in writing.”

“The court charged the jury, that if they believed said

Whitesides was the overseer of the said slave, and that the ownership of said slave had been proved as charged, and that said Whitesides had gone to the house where said defendant sold spirituous liquor, and told defendant to let said slave have a certain quality of spirituous liquor, and then went off and sent said slave to defendant's house with a jug for said liquor ; and that said defendant, in said county of Greene, and within twelve months before the finding of this indictment, measured said liquor, and poured it into the jug, and delivered it to the said slave, without any order in writing,—that then said defendant was subject to be convicted under said indictment." To this charge the defendant excepted, and asked the court to charge, in substance, that if the jury believed the evidence, they must find the defendant not guilty ; which charge the court refused, and the defendant again excepted.

No errors are assigned on the record.

STEPHEN F. HALE, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

RICE, J.—Where the overseer of a slave goes to a house where spirituous liquors are kept for sale, and tells the keeper that he will send the slave for a specified quantity of a particular quality, and goes off and sends the slave with a jug for the same ; and thereupon the keeper puts it in the jug, and delivers it to the slave,—the transaction is, in legal contemplation, the sale and delivery of the liquor *to the overseer*. The slave, in such case, is merely the instrument of the overseer. Such a transaction is not a sale, gift, or delivery of spirituous liquor to a slave, within the meaning of section 3243 of the Code, and is lawful without any order in writing.

The court below erred, therefore, in the charge given, and in refusing the charge asked.

Judgment reversed, and cause remanded.

## CAMP vs. THE STATE.

[INDICTMENT FOR RETAILING SPIRITUOUS LIQUORS WITHOUT LICENSE.]

1. *Special act of Dec. 16, 1851, "to regulate the sale of spirituous liquors in the town of Elyton," not repealed by Code.*—The act of December 16th, 1851, entitled "an act to regulate the sale of spirituous liquors in the town of Elyton", being a local act inconsistent with the provisions of the Code on the subject of retailing, is expressly continued in force by section 10 of the Code; and, since the two statutes cannot operate together within the same territorial limits, the town of Elyton, with the territory within two miles thereof, is not governed by the provisions of the Code against retailing without a license.
2. *Form of indictment allowed by the Code not sufficient under this act.*—When the State proceeds for a violation of this special act, the indictment must be framed in reference to it, and must either conform to its letter or substance, or must state the facts which constitute the offence created by it: the general form of indictment allowed by the Code (§ 1059) is not sufficient.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. GEORGE D. SHORTRIDGE.

THIS indictment was found at the August term, 1854, and was in the general form allowed by the Code (§ 1059.) On the trial, as the bill of exceptions states, "the State proved, by one Matthew Patton, that in the month of July, 1854, he bought a drink of whiskey from the defendant, and paid him ten cents for it; and that said whiskey was so bought in the town of Elyton, in the county of Jefferson. The defendant then introduced and read the act of the legislature of this State, approved December 16th, 1851, entitled 'an act to regulate the sale of spirituous liquors in the town of Elyton', and thereupon moved the court to exclude the evidence of the State as improper under this indictment; which the court refused to do, and the defendant excepted. The defendant then asked the court to charge the jury, that on the evidence of the State and of the defendant, under this indictment, their verdict ought to be for the defendant; which charge the court refused, and the defendant excepted."

These two rulings of the court are now assigned for error.

E. W. PECK, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

RICE, J.—The act of December 16th, 1851, entitled “an act to regulate the sale of spirituous liquors in the town of Elyton”, is a law of a local nature, operating only in that town and within two miles thereof; and is, therefore, expressly continued in force by section 10 of the Code.

The provisions of this act, and the provisions of the Code upon the subject of retailing without a license, are inconsistent with each other, and cannot operate together within the same territorial limits. The effect of that section of the Code which continues this act in force, is, to except the town of Elyton, and the territory within two miles thereof, from the operation of the provisions of the Code against retailing without a license.

That act created an offence, and prescribed its constituents, without reference to anything else. Facts which would constitute this offence, would not constitute the offence of retailing without a license as defined by the Code. The penalty for a violation of the act, is not the same as the penalty for a violation of the provisions of the Code against retailing.

An indictment authorized by section 1059 of the Code, for retailing, is not a proper indictment when the State proceeds only for a violation of the provisions of the act of 1851. To justify a conviction upon proof merely of a violation of the provisions of the aforesaid act, the indictment must be framed in reference to the act, and must either conform to its letter or substance, or must state the facts which constitute the offence created by the act.—*Skains v. The State*, 21 Ala. R. 218; *The State v. Brown*, 4 Porter’s R. 410; *Francois v. The State*, 20 Ala. R. 83; 2 *Waterman’s Arch. Cr. Pl.* 86–2; 1 *Hale*, 517 to 535; 2 *ib.* 170; 2 *East’s Rep.* 333; 1 *T. R.* 141; 1 *East’s Rep.* 643; 15 *ib.* 456.

The court below erred, in overruling the motion of defendant to exclude the evidence of the State, and also in refusing the charge asked by defendant; its judgment is, therefore, reversed, and the cause remanded.



MAYOR AND ALDERMEN OF HUNTSVILLE vs.  
PHELPS.

[SUMMARY PROCEEDING FOR VIOLATION OF MUNICIPAL ORDINANCE.]

1. *By-law imposing discretionary fine within fixed limits not void.*—A by-law of a municipal corporation, within the powers granted by its charter, is not rendered void for uncertainty, because the amount of the penalty imposed for its violation is left discretionary, within fixed limits, (*e. g.* “not exceeding fifty dollars,”) with the municipal court. (Overruling *Mayor and Aldermen of Mobile v. Yuille*, 3 Ala. 137, as to third head-note.)

APPEAL from the Circuit Court of Madison.

Tried before the Hon. THOMAS A. WALKER.

THE appellee (James F. Phelps) was arrested under the warrant of the mayor of Huntsville, on a charge of fighting within the corporate limits of the town, and was fined thirty dollars. From the decision of the mayor he took an appeal to the Circuit Court, where a complaint was filed against him, in the name of the mayor and aldermen, in these words: “The plaintiffs claim of the defendant thirty dollars, for quarreling and fighting within the limits of the corporation of said town, in violation of the by-laws of said corporation.” To this complaint the defendant pleaded, 1st, that he did not quarrel and fight within the limits of said town in violation of any by-law thereof”; and, 2d, “that the by-law under which he was fined is void for uncertainty.”

On the trial, the plaintiffs read in evidence the charter of the town of Huntsville, approved January 16, 1844, (for charter in full see Pamphlet Acts 1843-4, p. 153,) the fifth section of which confers on the mayor, within the corporate limits of the town, the same civil and criminal jurisdiction which a justice of the peace has in the county; and then read, from a code of laws adopted in 1850, an ordinance in these words: “Be it enacted,” &c., “that if any person shall be found quarreling, wrestling, fighting, or otherwise misbehaving in a disorderly manner, within the limits of the corporation, he, she, or they, on conviction thereof, shall forfeit

and pay to the use of the corporation a fine not exceeding fifty dollars; and it shall be the duty of the constable, in all such cases, to arrest the offenders, *ex officio*, and bring them before the mayor." It was further proved, "that the defendant, within the limits of the corporation, a short time before the institution of these proceedings, commenced a quarrel with one James J. McKibben, in the progress of which he struck the said McKibben several blows, and drew a knife, which he held over him at the time."

"This being all the evidence, the defendant then asked the court to charge the jury, that the plaintiffs could not recover of the defendant, because the said by-law read in evidence was void, for the reason that the penalty thereof was uncertain, and that it was left to the mayor to fix the amount thereof in each case. This charge the court gave, under the authority of Mayor, &c., of *Mobile v. Yuille*, 3 Ala. 137; to which the plaintiffs excepted."

This ruling of the court is now assigned for error.

ROBINSON & JONES, for the appellant, contended, that Yuille's case, 3 Ala. 137, is not a correct exposition of the law; that the authorities cited by the text-writers there referred to do not sustain their position; that they have been overruled by the recent case of *Peper v. Chappell*, 14 Mees. & W. 623, where the decision was in favor of the validity of the by-law; that the reason of the rule—viz., that it makes the corporation a judge in its own case—is entitled to no consideration, since it is equally applicable to all other cases over which the municipal court has jurisdiction under its charter, while the right of the mayor to sit in such cases has been often recognized by this court; that the discretionary power reposed in the mayor is reasonable and necessary, as it enables him to graduate the penalty according to the circumstances of each case; and that it is analogous to other provisions of our statutes, by which similar powers are entrusted to courts and juries, and is sustained by the universal understanding and practice of municipal corporations. They cited *Peper v. Chappell*, 14 Mees. & W. 623; *Town of Marion v. Chandler*, 6 Ala. 889; 14 *ib.* 400; 19 *ib.* 707; 21 *ib.* 577; 23 *ib.* 722; Code, §§ 3619, 3620; Ordinances of New

Orleans, pp. 39 to 42; Ordinances of Baltimore, pp. 164, 167; Ordinances of Nashville, pp. 157, 166, 167: Ordinances of Charleston, pp. 3, 17, 26, 86; Ordinances of Savannah, pp. 179, 180, 456.

J. W. CLAY, *contra*, cited and relied on Yuille's case.

CHILTON, C. J.—Just legislation requires that the punishment should be proportioned to the offence which is denounced, and any principle which forestalls such legislation is not founded in wisdom and sound policy. We have a number of instances furnished by our criminal code, where the courts and juries are vested with a liberal discretion in the apportionment of fines and imprisonment, so as to adjust them to the particular circumstances attending the commission of offences, and thus to carry out the great objects of the law, the peace of the community, the prevention of crimes, and the reformation of offenders.

In the case before us, it is not denied that the municipal corporation had the right, under its charter, to impose a fine; but it is insisted, that the by-law is void for uncertainty, upon the authority of *The Mayor and Aldermen of Mobile v. Yuille*, 3 Ala. R. 137. In that case, as in this, the by-law authorized the infliction of a penalty not exceeding fifty dollars, and it was held void. The court said, the penalty must be a sum certain, and cannot be left to the arbitrary assessment of the corporation court, to be determined according to the nature of the offence. The court further add, "The reason assigned is, that it permits the corporation to be a judge in its own case"; citing *Angell & Ames on Corporations*, p. 200, and *Wilcox on Municipal Cor.* 152, § 308.

These two elementary writers certainly sustain the view taken by the court in the case cited; but when the cases are examined upon which they rest, it will be found that they do not sustain them, except perhaps the case of *Wood v. Searl*, *Bridgman's Rep.* 139; and this case we do not think can be supported, so far as it rests upon the uncertainty of the law. Indeed, the Court of Exchequer, in *Peper et al. v. Chappell*, 14 Excheq. 623, has virtually departed from that case, and has affirmed the validity of a by-law substantially the same in principle with the one before us.

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That the corporation is made the judge in its own case, is no objection, since it applies equally whether the penalty is for a specific sum, or fixed within certain limits. The question whether the ordinance has been violated, is to be determined, in either case, by the corporation. The penalty is any sum less than fifty dollars. A reasonable discretion is given, to be exercised within certain limits; and we can see no objection which could be urged to such a by-law, which could not, with equal propriety, be made to any law investing courts or juries with discretion in apportioning the fine to the offence, being restricted within reasonable bounds.

The power of making just discriminations, so as to advance the ends of justice, and mete out to every violation of the law a punishment proportioned to its demerits, should reside somewhere; and since the charter invests the corporation with the power to pass such by-law, and to create proper sanctions, we do not conceive that the law in question is at all unreasonable, or uncertain, in that sense which renders it void.

It will be observed, that we do not consider the case of *The Mayor, &c. v. Yuille*, 3 Ala. 137, as a correct exposition of the law, as declared in the 3d head-note to that case; and to this extent it is overruled.

Let the judgment be reversed, and the cause remanded.

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BÉROUJOHN ET AL. vs. MAYOR, ALDERMEN, &c.,  
OF MOBILE.

[ACTION BY MUNICIPAL CORPORATION ON BOND OF CITY SEXTON.]

1. *By-law of municipal corporation imposing unequal tax for maintenance of public burial grounds and burial of paupers, declared void.*—It is the duty of a municipal corporation to maintain public burial grounds and to bury paupers, and the expense attendant on the discharge of this duty should in justice be apportioned among all the corporators; therefore a by-law, declaring that the city sexton, whose fees are paid out of the estates of the persons whom he buries, “shall expend, under the supervision of the committee on public



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grounds, five hundred dollars on the public burial grounds, and bury the paupers free of charge," is unreasonable, unjust, and void.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought (under the Code) by the mayor, aldermen and common council of the city of Mobile, against Claude Beroujohn and the sureties on his official bond as city sexton. The complaint, after setting out the condition of the bond declared on, avers the following breaches: "And plaintiff says, that the condition of said bond has been broken in this: first, that the said Beroujohn has failed to execute and perform all the duties of said office of city sexton, according to the provisions of the charter of said city and the several amendments thereto; 2dly, that said Beroujohn was elected under and by virtue of an ordinance entitled 'an ordinance amendatory to the ordinances now in force relative to the office of city sexton,' duly passed by plaintiff and approved by the mayor on the 28th day of February, 1853, which ordinance is in full force as to the duties which were incumbent on the said Beroujohn in said office, and is as follows:

'Section 1. Be it ordained by the mayor, aldermen, and common council of the city of Mobile, that there shall be elected, on the first Monday of March, 1853, a city sexton for the remainder of the municipal year, who shall expend five hundred dollars on the public burial grounds, and bury the paupers free of charge.

'Section 2. Be it further ordained, that the expenditure of the said sum of money shall be under the supervision of the committee on public grounds.

'Section 3. Be it further ordained, that all ordinances and parts of ordinances, conflicting with the above, be, and the same are hereby, repealed.'

And the said Beroujohn has wholly failed to comply with any of the requirements contained in the provisions of said ordinance."

The defendant demurred to the complaint, on the ground, 1st, "that said ordinance is illegal and void, and gives no right of action to plaintiff;" 2d, "that the said ordinance of the first Monday in March, 1853, is illegal and void, and

therefore there is no legal breach of said bond ;” and 3d, “that the complaint does not show a breach of the bond, in consequence of the non-performance of any duty the defendant was legally bound to perform.” The court overruled the demurrer, and its ruling is now assigned for error.

E. S. DARGAN, for the appellants, contended that the bond declared on was illegal and void, because it was intended to cover the ordinance which required the sexton to bury all paupers free of charge, and to expend five hundred dollars on the public burial grounds ; that this was a duty resting on the corporation, the burden of which ought to be borne as a common expense ; that the effect of the by-law, in forcing the sexton to bury the pauper dead free of charge, and to expend a large sum in beautifying the public burial grounds, was to make “the dead bury the dead” ; that the sexton would be thus compelled to seek indemnity for these expenses from the estates of those deceased persons who were able to pay ; that this was an indirect tax on the estates of decedents, of which the living bore no part ; that this tax was unequal and partial in its character, and therefore contrary to the fundamental law. He cited the City Charter, Pamphlet Acts 1844, p. 33, § 26 ; Story on Contracts, §§ 545, 546 ; Story’s Equity, vol. 1, §§ 295, 296, and cases there cited.

JNO. T. TAYLOR, *contra*. (No brief on file.)

GOLDTHWAITE, J.—It is unquestionably the duty of the city government to keep up the public burial grounds, and to bury the paupers ; and as all the corporators are interested in the discharge of this duty, in justice all should bear some portion of the burden it imposes ; and if the corporation was to pass a by-law, the effect of which was to throw the whole expense upon a particular class of the corporators, it would be so manifestly unjust, that no court could, we think, hesitate to declare it void as being unreasonable. Ang. & Ames on Corp. § 347. Neither would it make any difference, in principle, whether the by-law accomplished this result directly, or effected it by indirect means. In either aspect, it would be equally objectionable. The

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sexton is paid out of the estates of those to whom his services are rendered, and it is from that source he is to be reimbursed for the expenses he incurs in the discharge of the duties which the ordinance requires him to perform. If the expense was great, it would tend to undue exactions upon such estates; and this would be the case, although his charges might be regulated by the municipal authorities, since, to induce any one to take the office, the rates must be so fixed as to cover the expense and trouble of all the duties which the law requires him to perform. If the corporation had said that the estates of those who should be interred in the public burial grounds, or of those who were buried by the public sexton, should bear the expense of building a market house, or the cost of any other public improvement, it would be in opposition to the spirit and policy of the charter, as its tendency would be to levy an indirect tax upon a portion of the population only, and thus to disturb that equality of burden which it was the object of the fundamental law to provide against, by requiring that all taxable property should contribute to the expenses of the corporation only in proportion to its value, "making no distinction as to any person."—Acts 1843-4, p. 182, § 19. We can see no difference, in principle, between the case put, and the one presented by the record. The burial of paupers, and maintaining the burial grounds, is, in every sense of the word, a public corporation duty, the expense of which should be borne by the city; and the ordinance, by apportioning it unequally, is in spirit opposed to the law of the charter, and therefore void.

From what we have said, it follows that the court should have sustained the demurrer to the complaint; and as the correct action of the court below in this respect, will be decisive of the case, as now presented, it is unnecessary to go into an examination of the other questions.

Judgment reversed, and cause remanded.

MOSELY ET AL. *vs.* LANE.

[BILL IN EQUITY TO ESTABLISH RESULTING TRUST.]

1. *Administrator's duties and liabilities*—*Resulting trust in lands purchased by him with funds of the estate and re-sold at a profit.*—An administrator is bound not to do anything which has a tendency to interfere with his duty in discharging the trust. His office is not conferred on him for the purpose of enabling him successfully to engage in intrigues for his private benefit. If he purchases land, or other property, with the money of the estate, and afterwards re-sells it at a profit, the benefit of the purchase enures to the estate, and not to himself individually.
2. *Estopped by his conduct from denying that the purchase was made with funds of the estate.*—Where an administrator agrees with his co-administrator that they will buy certain lands for the estate at the Government land sales, and in compliance with that agreement procures him to join in raising funds for that purpose, and charges the estate with the expense of raising those funds; and prevents his co-administrator and the only adult son of the decedent from attending the sales, by assuring them that he will buy the lands for the estate, and at the sales prevents other persons from bidding for them, by declaring that he had come there expressly to buy them for the estate; and by these means, and with these funds, buys the lands for a sum greatly below what he would otherwise have had to pay for them, and takes the title in his own name, and soon afterwards re-sells them for a large profit,—he is estopped in equity, as against those representing the estate, from denying that the funds belonged to the estate. (Chilton, C. J., *dissenting*.)
3. *In whose favor trust enures.*—If the agreement was to purchase the lands "for the estate," and the administrators knew at the time that the estate was free from debt, the resulting trust enures to the benefit of the residuary legatees of the estate. (Chilton, C. J., *dissenting*.)
4. *Decree.*—On the facts of this case, the administrator was charged with the amount for which the lands were re-sold, and was allowed a credit for the amount of the original purchase money paid by him, together with his expenses in attending the land sales and procuring title to the lands; and interest was given on the balance found against him.

APPEAL from the Chancery Court of Lauderdale.

Heard before the Hon. E. D. TOWNES.

THE original bill in this case was filed by John Mosely and William Mosely, in March, 1847, and an amended bill was filed in March, 1851. The material allegations of the two bills are as follows: That their father, William Mosely, died in Morgan county, Alabama, in the year 1830, after having



made and published his last will and testament in writing, which was duly admitted to probate after his death, and which (among other things) contained the following provision :—

“ 8. \* \* \* \* And whereas, by the provisions of an act of Congress of the United States, I have the right of taking up other lands by occupancy, and I have become the purchaser of eighty acres of land in the township of my late residence, being part of the sixteenth section in said township ; I therefore will, that my executor and executrix (herein after named), out of my money and the proceeds of my perishable estate, pay out for said eighty acres what may be due thereon ; and the remaining land to which I have the right of occupancy aforesaid, I hereby direct them to complete payment therefor, according to the provisions of said act of Congress. And it is my will, that all my real estate (consisting of the lands above described and directed to be paid for, six lots in the town of Decatur, and the land given to my wife during her life) shall be equally divided among my four sons, William, Hilary, John and Drury, to-wit ; all the land and other real estate of which I may die seized and possessed to be so soon thereafter as convenient divided among my four sons immediately thereafter. I also will, that if either of my four sons should die before they arrive at the age of twenty-one years, the part of the land hereby bequeathed to him shall be equally divided among the remaining sons living. I will that all the rest and remaining part of my estate, of whatsoever nature or kind, which I may die seized or possessed of, not given heretofore in specific legacies, after the payment of my just debts and all expenses, I give and bequeath to my six youngest children—to-wit, William, Hilary, John, Drury, Elizabeth Ann and Sally Mosely, to be equally divided among them ; and if either of them should die before they arrive at the age of twenty-one years, without issue, it is my will that the part of the one so dying shall be equally divided among those living of the six children, being the youngest last named.”

The bill alleges that the executor and executrix named in said will refused to qualify, and thereupon letters of administration with the will annexed were, in the early part of the year 1831, granted to Isaac Lane and Jesse W. Garth,

the former of whom was the acting administrator and mainly attended to the business of the estate ; " that said Lane attended the Government land sales at Huntsville, in July, 1831, and, declaring that his object was to buy the lands hereinafter described for the estate of said William Mosely, did, with the means of said estate, purchase the following lands, all situated in Morgan county in said State—to-wit, the north-east quarter of section 15, in township 5, range 5 west, commonly called and known as the 'Ezekiel Owen quarter' ; the west half of the south-west quarter of fractional section 2, in same township and range, commonly called and known as the ' Bird quarter' ; and the north-west quarter of section 11, in same township and range—in all about 400 acres, for which said lands said Lane paid, out of the means of said estate, for 320 acres thereof \$1,25 per acre, and for 80 acres thereof \$1,34, or thereabouts, as complainants are informed and believe, and so charge. All of said lands, so purchased at said land sales in Huntsville, in July, 1831, for the estate of said William Mosely, had been previously relinquished to the Government of the United States by said testator, or by other persons ; but, as complainants are informed and believe, said lands were in possession of said testator during his lifetime."

The bill further alleges, that said Lane, within one year after said purchase at the Government sales, and during the minority of complainants, fraudulently sold said lands, pretendingly as administrator, but without any order or decree of the Orphans' Court, and without public notice, and purchased them himself for about \$600, when (as complainants allege) they were worth from \$4,000 to \$6,000 ; that said Lane has never paid over to said estate, nor in any wise accounted for, the amount at which he bid off said lands at said fraudulent sale ; that in 1832, or thereabouts, said Lane resold said lands for between \$3,000 and \$5,000, thus making a large profit, for which he has never in any manner accounted.

It is further alleged, that said Hilary Mosely, one of the testator's sons mentioned in the residuary clause of the will, died after said testator's death, before arriving at the age of twenty-one years, and without issue ; that said Elizabeth Ann

and Sally Mosely have each married since said testator's death, and that they and their husbands, together with said William Mosely, refuse to participate in this suit, and are therefore prayed to be made defendants. Said Lane is also made a defendant, and the prayer of the bill is, that he be made to account to complainants for their proportion of the profits realized on the re-sale of said lands ; that to this end an account may be taken ; and for general relief.

In his answer to the original bill, Lane states that he entered for the estate of said Mosely all the lands to which he was entitled under the act of Congress ; that the lands above described were bought by him with his own money, in his own name, and for himself, in company with others ; that these purchases were made by him with his own means, and not in fraud of complainants' rights ; and he states the prices at which he purchased and afterwards re-sold. He also denies the alleged fraudulent sale and purchase by himself at \$600, and that he ever said at the land sales that he was purchasing said lands for the estate. In his answer to the amended bill he states substantially the same facts ; and he afterwards amended this answer, by adding, " that he may have said, when he attended the land sales at Huntsville in 1831, that his object was to buy these lands, now made the subject of controversy in this suit, for the estate of William Mosely ; but he has no recollection of having done so, and if he did so, it was gratuitous, as he then had no funds of the estate in his hands to pay for them."

The evidence, so far as it is material to an understanding of the case as here presented, is substantially stated in the briefs and opinions, and therefore need not be here recapitulated. The chancellor, on final hearing, dismissed the bill, and his decree is now assigned for error.

L. P. & R. W. WALKER, for appellants :

If the lands for which Lane is sought to be charged in this suit were subject to pre-emption by Wm. Mosely, the decedent, it was Lane's duty under the will to enter them ; and in that aspect of the case, complainants would be entitled to them as devisees. But if Lane bought them with the money of



the estate, the testator having no right of pre-emption in them, then he must account to complainants as legatees.

I. According to the acts of Congress, although the original certificates of purchase had been transferred by Mosely, and these lands relinquished by the transferees; yet, if Mosely was in possession of them when he died, his estate had the right of pre-emption.—Acts of Congress of March 31, 1830, and February 25, 1831.

All of these lands, except the north-east quarter of section fifteen, had been relinquished by Mosely or his transferees, and were in Mosely's possession when he died, as Lane admits in his amended answer to the amended bill. On this state of facts, it is insisted for the appellants, that they were subject to pre-emption in favor of Mosely's estate; that it was Lane's duty, therefore, under the eighth item of the testator's will, to enter them for the benefit of the devisees; and that having purchased them for the estate, they enure to the benefit of said devisees.—*Greene v. Moore*, 1 Stew. & P. 212.

II. But however this may be, the complainants are clearly entitled, on the facts shown by the record, to recover as legatees. If a trustee lay out the money which he holds in his fiduciary character in the purchase of lands, and takes the conveyance to himself, the person entitled to the money may, at his election, charge the trustee personally, or follow the money into the land, and claim the purchase as made for him. *Turner v. Petigrew*, 6 Humph. 438; 1 *White's Equity Cases*, p. 178, and cases there cited. The only question here, then, is, whether equity will consider the purchase of these lands as having been made by Lane with funds held by him in his fiduciary character, or, in other words, whether the facts make out a case of implied trust in favor of the estate.

Lane was occupying a fiduciary relation, he and Garth being administrators, with the will annexed, of Wm. Mosely. He had agreed with his co-administrator to purchase these lands for the estate; and in compliance with the agreement, a bill of exchange for \$2, 500 was drawn by Lane, and endorsed by Garth; "and they sent Wm. Mosely," as Garth testifies, "to Nashville, to sell the bill to raise the money for the purpose of buying these lands. The bill was drawn for



more money than the administrators thought would be needed to pay for the land ; but it was agreed that Lane should use the balance of the money, and account for it. The cotton crop of 1831 was equal in value to the amount of the bill, and Lane afterwards bought the cotton crop of that year, and was to pay the bill." Before the land sales took place, Lane told others (including Garth, the legatees, and third persons) that he was going to the sales to buy these lands for the estate ; while at the sales, he prevented the competition of other bidders, by stating that he meant to buy them for the estate ; and after the sales were made, he stated that he had bought these lands, according to the previous agreement with his co-administrator, for the estate. The expenses of negotiating the bill of exchange were charged to the estate ; part of its proceeds was appropriated to the payment of these lands, and the balance (according to said previous agreement) used and accounted for by Lane individually. Upon these facts, will a court of equity now permit this administrator, after he has made a profit out of these purchases, to shelter himself behind the plea that the bill of exchange was not legally binding on the estate, and that he and Garth had no right to make it as a contract of the estate? This would be suffering him to take advantage of his own wrong. His words and acts estop him from setting up this defence, and from denying that he held the funds in his fiduciary character as representative of the estate.—*Brown v. Lynch*, 1 Paige's R. 147 ; *Brown v. Brown*, 1 Strobl. Eq. 363 ; *Harris v. Carney*, 10 Hump. 349 ; *Pegues v. Pegues*, 5 Ired. Eq. 418 ; 1 Story's Equity, §§ 465, 322 ; 2 *ib.* §§ 1210, 1211a ; *English v. Lane*, 1 Port. 328 ; 24 Ala. 380 ; *Boyd v. McLean*, 1 Johns. Ch. 582-90 ; *Tench v. Leach*, 10 Ves. 517 ; *White v. Swain*, 3 Pick. 365 ; *Harrison v. Mock*, 10 Ala. 185 ; 2 Wharton's Digest, p. 613, § 33 ; *Page v. Page*, 8 N. H. 187.

In cases of fraud, and where the proceedings have been *malâ fide*, there is a resulting trust by operation of law. *Robertson v. Robertson*, 9 Watts, 32. Executors and administrators are not allowed to derive a personal benefit from the manner in which they transact the business of the estate. *Montgomery v. Givhan*, 24 Ala. 583. Admitting that Lane advanced the money, yet, at the time, he intended that ad-

vance as a charge upon the estate. He afterwards bought the cotton crop of the estate, and, in consideration thereof, then agreed that he would individually discharge the bill : what he had before held a charge on the estate, he then contracted to assume and pay off as a personal charge upon himself. Under these circumstances, equity will, at least, treat the pretended advance of money as a loan, and consider the land as purchased with the money of the estate.—1 Johns. Ch. 582 ; 4 *ib.* 118 ; 1 Russ. & My. 53 ; 2 My. & K. 819 ; 1 Paige's R. 885 ; 24 Ala. 580. It is not essential to a resulting trust that the money should, at the time, be technically and strictly the money of the *cestui que trust* : if the trustee treated it as such, and at the time it was used held the *cestui que trust* chargeable for its return, or intended that the security on which it was procured should at maturity be discharged out of the funds of the *cestui que trust*, this is clearly sufficient, especially if *mala fides* has intervened.—Authorities cited above.

The fact that Lane did not, in his settlement with the Orphans' Court, charge the estate with the bill of exchange, cannot avail him anything. The settlement was *ex parte*, being made without notice to any one ; and the omission of this bill as a charge against the estate was a clear afterthought, as is shown by comparing the dates of the settlement and the other transactions. Notice, too, that the cotton crop of 1831 is not accounted for until January, 1834, which was after the re-sale of the land.

WATTS, JUDGE & JACKSON, *contra* : .

I. If Lane is liable at all to the complainants, it is because of a resulting trust in favor of the complainants, growing out of the facts connected with the purchase of the lands described in the bill. In order to determine this question properly, we must first see what is necessary to constitute such a trust. The whole foundation of such a trust, is the payment of the money by the *cestuis que trust*.—See Moore v. Jackson, 6 Cowen 726 ; Botsford v. Burr, 2 Johns. Ch. R. (m. p.) 409, and the authorities there cited ; Steere v. Steere, 5 *ib.* 20 ;—see all the cases bearing on this subject collected in White's Leading Cases in Equity, (Law Lib. edit.) on pages 175-6-7, in comment on Dyer v. Dyer.

If a party, who sets up a resulting trust, cannot show that he paid the purchase money, or that the money used in making the purchase was his, he cannot by parol proof show that the purchase was made for his benefit, or on his account.—See authorities above cited, and *White v. Carpenter*, 2 Paige 238. Payment by the *cestuis que trust* must be clearly proven to have been made before or at the time of the purchase.—*Royd v. McLean*, 1 Johns. Ch. 590, and the authorities cited above; and particularly the authorities cited in *White's Leading Cases*, on pages 175–6–7. The same doctrine is maintained in *Givhan v. Montgomery*, 24 Ala., as well as in the case of *Harrison v. Mock*, 10 *ib.* But in these cases, the persons against whom the trust was set up and maintained had the money of the *cestuis que trust* in hand at the time of the purchase, and declared the trust at that time. A resulting trust will never be raised in fraud of a legal duty, or of the laws of the land.—See *Legget v. Dubois*, 5 Paige 117. It would have been a violation of the duty of Lane, as administrator of Mosely, with the will annexed, to have used the moneys of the estate in purchasing the lands. It would have violated the will of his testator, because thereby the daughters of Mosely would have had their shares diminished, and the sons theirs increased, contrary to the intentions of the will of the testator, Mosely.

II. In this case, the facts clearly prove that Lane had no funds of the estate, much less of the complainants, in his possession at the time of the purchase, and never, at any time, appropriated any of the funds of the estate to the purchase of these lands. He had no funds of the estate in hand. He accounted for every dollar he ever had. He was under no legal obligation, without funds of the estate in hand, to purchase any lands. He had no authority to charge the estate by any contract of his, to raise funds.—*McEldery & Chapman v. McKenzie*, 2 Por. 33. The estate of Mosely was never charged with the funds raised on the bill of exchange discounted in Nashville. The only amount with which the estate was charged, was the amount used in paying for the two quarter-sections, under the act of Congress, as directed by the will. Lane could not charge the personal estate of Mosely with the payment for the lands, the proceeds of the

sale of which are in controversy, without manifest injustice to the daughters of Mosely. The will of the testator forbids it. Lane actually paid for, and completed the title to, all the lands he was authorized to purchase and perfect title to, by the will of testator; and these lands thus paid for have been divided amongst the complainants and their brother, and they have for years been in possession of them. They are, therefore, estopped from all further claim to the lands, or their proceeds, now in controversy.

But, it is said by the opposing counsel, that Lane is estopped from denying that the funds derived from the bill of exchange discounted in Nashville, belonged to the estate? Why? Who has been deceived by his declarations in this respect? There is not the semblance of an estoppel here.—*Steele v. Adams*, 21 Ala. 535, and authorities there cited.

III. Only two of the heirs of the deceased (Mosely) file their bill, insisting that the proceeds of the lands, or profits of the sale, ought to go to them and another brother. Now, if there is any trust at all proven, it is for all the children of Mosely ("for his estate"), and not for the male children alone; and for this reason, if for no other, the complainants are not entitled to a decree.

IV. It is clear from the proof, that Lane has not been benefited by the purchase of these lands. Whatever profit was made, was given as a mere gratuity to the daughters of Mosely.

RICE, J.—An administrator is bound not to do anything which has a tendency to interfere with his duty in discharging the trust. His office is not conferred on him for the purpose of enabling him successfully to engage in intrigues for his private benefit. If with the money of the estate, he buys property, and thereby makes a profit, the estate is entitled to it, although the estate could not possibly have been injured by his use of the money. If, with his own money, he buys up the debts of the estate at an under-value, the advantage thus derived does not belong to him, but to the estate, although, before he bought them up, the estate was bound to pay the full amount of those debts. The just and settled policy of the law is, to deter him from placing himself in a situation



which gives him a *bias* against the discharge of his duty, and to shield him from temptation, by destroying every allurements to faithlessness or fraud.—*Montgomery v. Givhan*, 24 Ala. R. 568.

The mere fact of his being administrator does not, *per se*, disable him as an individual from buying, *bona fide*, with his own money, property to which the estate has no right. But when he agrees with his co-administrator, that they will, at the Government land sales, buy certain lands for the estate; and in compliance with that agreement, procures him to join in raising the funds for that purpose; and charges the estate with the expenses of raising the funds; and prevents his co-administrator, and the only adult son of the decedent, from attending the land sales, by assuring them that he will buy the lands for the estate; and at the sales prevents other persons from bidding for them, by declaring that he had come there expressly to buy them for the estate; and by these means, and with these funds, buys the lands for a sum greatly below what he otherwise would have had to pay for them; and takes the titles in his own name, and soon afterwards sells them for large profits,—he cannot retain these profits. His doing so, under a claim that they belong to him, is a fraud, against which a court of equity has power to relieve. 1 Story's Eq. Jur. § 256; 2 *ib.* §§ 781, 1265; Story's Eq. Pl. § 767; Gaither v. Gaither, 3 Maryland Ch. Decisions, 158; Sweet v. Jacobs, 6 Paige's Ch. R. 355; Brown v. Lynch, 1 *ib.* 147; Lillard v. Casey, 2 Bibb's R. 459; McDonald v. May, 1 Rich. Eq. R. 91; Johnson v. Kay, 8 Humph. R. 142; Haywood v. Ensley, *ib.* 460; English v. Tomlinson, *ib.* 378; *Montgomery v. Givhan*, *supra*; Story on Agency, § 211; Barkelew v. Taylor, 4 Halsted's Ch. R. 206; Benson v. Heathorn, 1 Y. & Coll. C. C. 326; Fawcett v. Whitehouse, 1 Russ. & Mylne, 132, and notes; Lees v. Nuttall, *ib.* 53, note 1.

We think it is sufficiently proved, that Lane, as the active administrator, had control of a large amount of property of the estate; that he and his co-administrator, Garth, knowing that the estate in 1831 was free from debt, and that the cotton crop of the estate of that year would be worth more than \$2,500, agreed to buy the lands described in the amended

bill for the estate ; that to make this purchase, they drew the bill of exchange for \$2,500, intending at the time that its proceeds should be used, as far as was necessary, in purchasing said lands for the estate, and also intending that said bill of exchange should be paid out of the property, or cotton crop of the estate, over which they had control ; that the expense of getting the bill negotiated were charged to the estate by Lane ; that the lands were bought by Lane, and paid for out of the proceeds of said bill, according to their aforesaid agreement and intention ; that Lane did make the purchase of said lands at the Government sales in July, 1831, for the estate ; that he, by agreement with Garth, did take the cotton crop of the estate, which was of greater value than said bill, and agreed to pay the bill, and did pay the bill after so taking said cotton crop ; that Lane, by his line of conduct and declarations in relation to said lands, did induce Garth and young William Mosely, and others who had and felt an interest in causing these lands to be bought for the estate, to believe that he (Lane) would attend the land sales and buy them for the estate with the proceeds of said bill ; that Lane thus influenced the conduct of Garth and young William Mosely and others, to the prejudice of the residuary legatees ; that Lane, at the land sales, declared he was buying said lands for the estate, and thus prevented competition ; that by Lane's declarations before the sales, that he would go and buy the lands for the estate, Garth and young William Mosely were misled and prevented from taking other measures to have the lands bought for the estate ; that by such means, which more fully appear in the record, Lane at the Government sales became the purchaser of the lands, at a grossly inadequate price, and has so dealt with them since as to make large profits out of them, which he now claims as his own property.

Under all the circumstances disclosed in this case, we hold that Lane is estopped, as against the complainants, from saying that the proceeds of said bill of exchange, which he used in purchasing said lands at the Government land sales, in July, 1831, were not then held and used by him as the funds of the estate. In this suit, as against Lane, we must take it as established beyond denial by him, that said purchase of

said lands was made with funds held and used by him at that time as the funds of the estate. Any other construction would enable him to consummate a fraud. It is but sheer justice to apply the doctrine of *estoppel* in this case.—Dezell v. Odell, 3 Hill's (N. Y.) Rep. 219 ; 1 Greenlf. Ev. §§ 27, 207, 208 ; Barkelew v. Taylor, 4 Halsted's Ch. R. 206 ; McDonald v. May, 1 Rich. Eq. R. 91 ; Sweet v. Jacocks, 6 Paige's Ch. R. 355 ; White & Tudor's Leading Cases in Equity, vol. 2, part 1, pp. 560–62.

The case, thus viewed, is stripped of its greatest difficulty. "It is the ordinary case of a trust created by one person for the benefit of another, without his knowledge, and accepted by such other person upon being notified of such trust. Such a trust is not prohibited by statute. It belongs to what Chancellor Kent calls 'that mysterious class of trusts arising or resulting by implication of law,' and which the legislature have left 'undefined and untouched.' Such trusts arise from *the obvious intention of the parties*, though not expressed in the instrument with which they are connected ; or *they are forced upon the conscience by the manifest justice of the case.*" "Such trusts must be recognized and enforced, from the very necessity of the case, in order to prevent the grossest injustice. A party will not be allowed, in a court of equity, to shelter himself from responsibility for a fraud, under cover of a statute to prevent frauds.—Hosford v. Merwin, 5 Barb. Sup. Ct. Rep. 41 ; Benson v. Heathorn, 1 Y. & Coll. C. C. 326 ; Fawcett v. Whitehouse, 1 Russ. & Mylne, 132 ; Page v. Page, 8 New Hamp. R. 187 ; White & Tudor's Leading Cases, vol. 2, part 1, pp. 560, 561.

Upon the pleadings and proofs, we think the complainants were clearly entitled to a decree.—Sweet v. Jacocks, 6 Paige's Ch. R. 355 ; Tompkins v. Reynolds, 17 Ala. R. 109 ; McDonald v. May, 1 Rich. Eq. R. 91 ; and other cases *supra*. We will now indicate to what extent relief should be granted.

If, after said purchase at the land sales at Huntsville, Lane settled with the Orphans' Court for the entire value of the cotton crop of the estate of 1831, and did not in any manner, in his settlement, charge the estate with anything on account of said lands, except the expenses of getting said bill

of exchange sent to Nashville and negotiated, then, in this case, he ought not to be charged with the entire prices for which he sold said lands at private sale, and interest thereon, but there should be deducted therefrom the amounts paid by Lane for said lands whilst he was at the land sales at Huntsville, in July, 1831, as those amounts are stated in his answer. In other words, Lane ought to be held liable for *the net profits* made out of said lands, and interest thereon. In estimating *the net profits*, Lane must be held chargeable with the prices at which he made the last sales of said lands, whether he has ever received those prices or not, unless he shows that they never could have been collected; and he must be credited with whatever sum he was compelled to pay to get the title to said lands, unless he has heretofore obtained a credit therefor. Interest must be allowed on the balance against him.

It appears that the administrators spoke of the cotton crop of 1831, as the cotton crop of the estate. It is evident that, under the will, the estate being wholly free from debt in 1831, that cotton crop really belonged to the residuary legatees, and that the administrators knew this to be so. The expenses of getting the bill of exchange negotiated were charged to the estate. This was equivalent to charging those expenses to the residuary legatees; for thereby the residuum to which they were entitled was diminished. These circumstances serve to show, that when Lane and Garth agreed to buy the lands *for the estate*, they meant for *the residuary legatees*, who under the will were entitled to every portion of the estate not specifically devised or bequeathed. The complainants are two of five surviving residuary legatees;—the other three, who refused to join in prosecuting the suit, are made defendants. The administrator of the only other residuary legatee mentioned in the will, is made a party defendant;—that other legatee having died intestate, before arriving at lawful age, and without issue, his share under the residuary clause belongs to the five surviving legatees. Upon the case as presented, the complainants are entitled, as against Lane, to have the net profits arising from the lands described in the amended bill, on his re-sale of them, treated as part of the estate of the testator; and they are therefore entitled to a decree for two-fifths of those profits and interest,—the profits to be ascertained as hereinabove indicated.



The decree of the chancellor in this case is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Lane must pay the costs of this court.

CHILTON, C. J.—It is certainly true that a trustee is not permitted to make gain to himself out of his fiduciary relation, beyond a reasonable compensation for his services; and while I agree with what my brethren have said upon this subject, I do not think the subject-matter of this suit, *as disclosed by the allegations of the bill*, and shown by the proof, brings it within the influence of this principle.

The complainants must not only make a good case by their bill, but they must, at least substantially, prove the case which they do make, if their allegations are denied by the answer. They proceed here upon the idea of resulting trust—that their funds have been used by the executor, Lane, in the purchase of land, which he has sold, and from which he has derived a profit; which profit, they insist, they have a right to pursue and recover. But the proof shows, that the funds which were used in the purchase, were not the funds of the estate. They were borrowed in Nashville, Tennessee, upon the personal responsibility of the executors—upon a bill, for the payment of which the estate was in no wise bound. It may be that this debt of the executors was paid out of the funds of the cotton crops raised by the estate. This, however, would not, in my opinion, change the principle and convert that into a resulting trust which before was no trust. It is sufficient, in the aspect in which the bill presents the complainants' case, to show that the funds with which the land was purchased did not belong to the estate.

But it is said the complainants should recover upon the doctrine of estoppel; that Lane said he would buy the land for the estate, and thus prevented his co-executor and the adult heirs from making the purchase for its benefit. It is, in my conception, a conclusive answer to this view, that neither of these persons had any authority to invest the funds of the estate in such purchase. If they had done so, it would have amounted to a tortious conversion of them, for which they would have been liable. The will of the testator forbade the use of the funds in this way, and it was the duty of the

executors faithfully to carry its provisions into effect. So that to hold Lane liable for the proceeds of the land, it must come to this:—If one party threaten to convert funds of an estate, by reason of which another is prevented from doing it, the party who threatened or said he would do so, must be held accountable as though he had done it. Although he has repented and complied with the law, yet, as he said he would not comply, he must be treated as though he had not, and estopped from showing that he has.

It is not pretended that Garth or William Mosely would have purchased the land with their private funds for the estate, and have made a donation of it. It must be assumed, then, that they contemplated using the funds of the estate. This they had no right to do, and so they have been prevented from doing nothing which the law allowed them to do, by the declarations of Lane. So far as the record discloses, Lane has accounted for the funds of the estate. The small sum allowed him as expenses for sending to Nashville for funds, a part of which was used in the purchase of the land in dispute, should properly have been divided between himself and the estate, in proportion as the money was shared between them and it; the record showing that a portion of it was used in paying for land required to be purchased by the will. But this can have no influence upon the case before us, except as tending to show whose funds were used in buying the land mentioned in the bill.

But, finally, there is another substantial reason for refusing this relief, conceding the foregoing views to be untenable. It is this—the promise was “to purchase for the estate.” The bill is filed by some of the residuary legatees. These profits sought to be recovered, are clearly no part of the estate proper which can pass under the will. They could not have been within the contemplation of the testator. Yet, by the decree of this court, they are made to pass under the will to the residuary legatees.

These are some of the reasons which compel me to dissent from the opinion of a majority of the court. In legal contemplation, the estate has not been injured by the failure of Lane to convert the funds after he had declared he would do so, and hence no principle of estoppel can be invoked to hold

him to his declaration. Neither has he taken anything from the estate to which it was entitled, by making the purchase in his own name, and for his own account. The bill fails to show that he prevented a gift or donation from being made to the estate, but merely that *he prevented* a speculation with the funds of the estate, which the law would not allow, and which, in other hands, may have proved disastrous instead of profitable.

## MOBILE MARINE DOCK & MUTUAL INSURANCE CO. *vs.* McMILLAN & SON.

[ACTION (UNDER CODE) ON MARINE POLICY OF INSURANCE.]

1. *Custom affects policy.*—Every usage of trade which is so well settled, or so generally known, that all persons engaged in that trade may fairly be considered as contracting with reference to it, is regarded as forming part of every policy designed to protect risks in that trade, unless by the express terms of the policy, or by necessary implication, such inference is repelled.
2. *General rules for construction of policies.*—The same rules of construction by which the sense and meaning of all other instruments are determined, apply equally to policies of insurance; yet policies are to be construed liberally for the benefit of the assured, and if any doubt should arise upon the meaning of the whole instrument, greater effect should be allowed to the written than to the printed words.
3. *Difference between contracts of insurer and carrier.*—The contract of the insurer is not necessarily co-extensive with that of the carrier by whom the goods are transported, and it is therefore erroneous to hold him liable until the goods are delivered to the consignee, or to some one for him, or are landed at the place where it is usual for him to receive goods. The carrier, by the terms of his contract, or by force of a custom, may be liable for the overland transportation of the goods, after they shall have been landed at the accustomed port of destination, to the place where the consignee usually receives goods, or until delivered to him; while the risk of a marine policy is at end, in the absence of express stipulations to the contrary, whenever the goods can be considered safely landed according to the usual course of business, at the accustomed port of destination, although they may never have been delivered to the consignee.
4. *Port of New Orleans, in marine policy, means usual place of landing goods on wharf at Lake Pontchartrain.*—A marine policy was effected on a lot of cotton, shipped from Mobile to New Orleans, on-board of a vessel which did not go

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Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son.

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to the city of New Orleans, but always discharged her cargo at the wharf on Lake Pontchartrain; and the stipulation of the policy was, that the risk should continue "until the said goods shall be safely landed at the port of New Orleans": *Held*, that the risk terminated with the safe landing of the goods at the wharf on Lake Pontchartrain.

5. Error without injury will not reverse a judgment.

6. *Policy held a severable contract.*—A policy of insurance upon 198 bales of cotton, valued at \$9,900, at a premium of three-sixteenths, is so far a severable contract, that the underwriters are discharged from liability for whatever portion is safely landed at the port of destination.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS was an action (under the Code) on a policy of insurance on 198 bales of cotton, shipped from Mobile to New Orleans, on board of the *Helen*; and the only plea was, the general issue, with leave to give any special matter in evidence. The amount insured, endorsed in gross, was \$9,900; the rate three-sixteenths of one per cent.; and the stipulation as to the beginning and duration of the risk, as "Beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board the vessel called the *Helen*, at the port of Mobile, and so shall continue and endure until the said goods and merchandise shall be safely landed at the port of New Orleans."

The facts proved on the trial, as stated in the defendant's bill of exceptions, were as follows:—

"The plaintiffs proved the contract of insurance with the defendant upon 198 bales of cotton, valued at \$50 per bale, and shipped from Mobile on the steamer *Helen*. They also proved that said cotton was laden on board the *Helen*, from the wharf in the city of Mobile, on the — day of January, 1854, and was consigned by bill of lading to Rugely, Blair & Co., who did business in the city of New Orleans; that said steamer arrived at the wharf belonging to the Carrollton and Jefferson railroad company, on the southern shore of Lake Pontchartrain, and distant about eight miles from the depot of said railroad in the city of New Orleans, on the evening of the 28th January, 1854, about 8 o'clock, P. M., and immediately began to unload her cargo on said wharf; that while so unloading, but before all her cargo (which con-



sisted of about five hundred bales) had been landed—to-wit, about one-third of it—on said wharf, the steamer Georgia made fast to the same wharf at about 11, P. M.; that a fire broke out on the Georgia, which extended to the wharf, and consumed the Georgia, the wharf, and all the goods thereon; that at the time of the fire, about 134 bales of plaintiffs' cotton had been put off from the Helen, and were there consumed, and only 64 bales (out of the whole shipment of 198 bales) came to the possession of said consignees in New Orleans, which said 64 bales were received by the consignees without objection. It was agreed that the value of said 134 bales, under the policy, was \$6,700.

“There was evidence tending to show that it is the custom of steamboats, in the trade between Mobile and New Orleans, to contract to deliver their cargoes in the city of New Orleans, and that the railroad to the city, in the transportation to the city, acts as the agent of the boat; that the boat collects the freight for the whole trip, and pays to the railroad its proportion of the freight; that goods shipped at Mobile, on any of the lines to New Orleans, are deliverable in the city of New Orleans, at the depot of the railroad, by the terms of the ordinary bill of lading.” (A copy of such bill of lading, showing this fact, is here attached as an exhibit to the bill of exceptions.)

“On the part of the defendant, it was proved that the Helen was a regular packet, running between Mobile and New Orleans; that she uniformly landed her cargo on the southern shore of Lake Pontchartrain, on the wharf at the lake end of the Carrollton and Jefferson railroad, and there took on board her cargo for Mobile; that this was her regular and uniform place of discharge, and of taking her cargo on board, well known to all in the habit of shipping goods by her; and that plaintiffs were in the habit of shipping goods by her. It was proved, also, that the steamboats engaged in said trade had each their regular places of landing on Lake Pontchartrain, and did not approach nearer to the city of New Orleans than the south side of Lake Pontchartrain, where they uniformly laded and unladed their cargoes; that there is a canal connecting the city with the lake, but it is not used by these steamers; that goods may also be carried

to the city by way of the Mississippi river, and landed on the levee, but such voyage is unusual, and would subject the shipper to a larger premium for insurance than by way of the lake. There was evidence, also, tending to show that, in mercantile understanding, the port of New Orleans embraces the wharves of the railroad on the lake, as well as the levee on the Mississippi river; but as to this, there was also proof that the landing at the lake is in a different parish from that of New Orleans, and a distinct port of entry.

It was in proof, also, that it was usual and customary for steamboats in this trade to unload their cargoes on the railroad wharf, immediately on their arrival, whether by day or night—if in the night, the cargo is received on the next morning, and forwarded by the first cars; if by day, the same is received and forwarded by the first cars which leave for the city, and is *then* (?) delivered to the consignee named in the bill of lading; that when goods are landed upon the wharf, the officers and crew of the boat usually exercise no further control over the goods, and they are taken charge of by the officers and servants of the railroad company, who transport them to the city in fulfillment of the contract of the boat with the shipper; that no notice is given to the consignee of the arrival of the boat at the wharf, (he residing in the city of New Orleans,) nor is any notice of such arrival at the wharf given to any one, nor was any notice given to any one in this instance; that the boat unloads her cargo at the wharf, and the agents of the railroad company there receive it, and forward it to the city, as above stated; that the boat in this case proceeded with her unloading as was usual and customary; that a watchman, employed by the railroad company to keep watch over the wharf and goods thereon, was on the wharf at the time of the arrival of the *Helen* and the unloading of her cargo, but there was no proof that he interfered, or had any authority to interfere, with the landing of the cotton from the boat, or to take charge of it when landed—he was a mere sentinel; that one hundred and thirty-four bales of the plaintiffs' cotton had been landed from the boat, on the wharf, at the time of the fire, and such landing had been in all things as usual and customary with the *Helen*, and nothing more remained to be done by her crew and officers about the

landing of said 134 bales, but the obligation of the boat continued to transport said cotton to the city of New Orleans.

“Two instances were shown to have occurred in Mobile, previous to this shipment, wherein a larger premium had been demanded by insurers, and paid by assured, to cover the risk of goods while on the voyage, as well as on the railroad after they had been unladed from the boat, than was the usual rate demanded and paid as premiums for the ordinary contract of insurance on goods ‘till safely landed at the port of New Orleans.’ No other instances were shown, prior to this fire, where the question had been considered; and no cases were proven, prior to this fire, of losses that had happened after the goods had been unladen from the boat, or on the railroad between the lake and the city, having been either paid or refused. There was no proof that any loss had occurred prior to the fire proved in this case. The two cases referred to were stated by the witnesses to have occurred in this wise: The parties wishing insurance applied to the underwriters, stating that they wished to cover the cotton till in warehouse, or until on shipboard there (which was not collected); the risk was taken, and policies executed, of which a copy is hereto annexed as an exhibit; and it was proved, also, that the assured in these two cases took a further policy in New Orleans, covering the thing insured from New Orleans till laden on shipboard in the Mississippi river.

“The court charged the jury, that whether the policy in this case extended to New Orleans, or only to the terminus of the boat’s voyage at Lake Pontchartrain, the liability of the insurer continued until the goods were safely landed; that if they were burned before they were landed, the plaintiff was entitled to recover; that as to the phrase ‘until safely landed’, they must look to the custom, if any had been proved; that, to discharge the underwriters, there must be either an actual or a constructive delivery of the goods; that the liability of the insurer continued till the goods were safely delivered to the consignee, or some one for him; that an actual delivery was established when the cotton was safely landed on the wharf, or the usual place of delivery, and received by the consignee, or by some one there authorized to receive it for him, or where any one authorized to



receive took charge or control of the cotton as it was put off from the boat; that the putting off from the boat of any number of bales on the wharf, unless some one in behalf of the consignee took charge of the cotton, was not sufficient to discharge the underwriter; that if the cotton was landed at the usual time, in the usual manner, and at the usual place, and the consignee (or some one authorized to receive the cotton for him) had a reasonable time to take control of it,—that would be a constructive delivery; that the custom which would govern the case must be a reasonable mode of delivery, and it was not sufficient for the boat simply to have the cotton put on the wharf after eight o'clock in the night, without notice to the consignee, or some one for him, and without delivery to him, or to some one for him; that if they found the unlading of the cotton was begun as late as 8 o'clock at night, and while the unlading was in progress, and before the 198 bales had been put off from the boat, it was burned, and there was no person there authorized to receive it for the consignee, and no person authorized to take charge of it had been notified of its arrival,—then the putting off of the 134 bales would not be a compliance with the policy, and plaintiff must recover.

“To this charge the defendant excepted, and then requested the court to charge as follows:—

“1. That the defendant is not liable to make good any loss that may have occurred to the cargo of the *Helen* after the same had been safely landed from the boat; which charge the court refused, and the defendant excepted.

“2. That if the cotton in question was landed at the usual wharf of the *Helen*, and in the usual manner, and was thereafter destroyed by fire, the jury must find for the defendant; which charge was refused, and the defendant excepted.

“3. That if the jury believe the 134 bales sued for were landed from the *Helen* at her usual place of discharge, and in the usual manner, and were subsequently burned on the wharf, plaintiffs cannot recover; and this, though the whole shipment consisted of 198 bales, of which sixty-four still remained on board the boat; which charge the court refused, and the defendant excepted.

“4. That if the plaintiff, by himself or agent, received and



accepted from the Helen sixty-four bales, part of this shipment, he is not entitled now to object that only 134 bales (and not the 198) had been landed on the wharf; which charge the court refused, and the defendant excepted.

"Defendant also requested the court to charge—

"5. That the defendant is not liable as general insurer against injury to the cotton on its transportation from Mobile to the city of New Orleans.

"6. That the liability of the defendant does not extend to inland risks, or risks on the railroad, beyond the wharf at Lake Pontchartrain.

"7. That to discharge the defendant, it is not necessary that the goods should be actually delivered to the consignee named in the bill of lading—it is sufficient that the goods be landed from the boat, at the usual place of unloading her cargo, and in the mode and manner customary in the trade.

"Which charges (Nos. 5, 6, and 7), as asked by defendant, were refused, but were given by the court as asked in connection with the following charge—to-wit: However true it may be that, when we speak of New Orleans, we mean the city which bears that name, it does not follow that the same meaning is attached to the word when used in a policy. The insurance is at and from the port of Mobile to the port of New Orleans; the term New Orleans means the port of New Orleans, the place which is the ultimate destination of the vessel on which the goods are laden. The voyage is understood to be terminated, when the vessel arrives at her port of destination, and has been moored there in safety twenty-four hours. The termination of the voyage as to the vessel does not necessarily terminate the risk on the goods: this risk may continue when the voyage as to the ship is ended; its duration depends on the intention of the parties, and this intention must be found in their contract. The words of the policy being, 'Beginning the adventure on the said goods and merchandise from and immediately following the lading thereof on board of said vessel at Mobile, and so shall continue and endure until the said goods and merchandise shall be safely landed at the port of New Orleans,'—the risk continues until the goods are safely landed, although the voyage as to the vessel might be terminated previous to their land-

ing ; and this risk continues until the goods are safely landed at the usual place, and at the disposal of the consignee. If it was usual to receive goods at the wharf on Lake Pontchartrain, or wherever it is usual for the consignee to receive his goods, it would be the duty of the consignee to receive them there, and a landing at such place would be a landing at the port of New Orleans ; but the risk of the insurer is not discharged until the goods are landed at the place where it is usual for the consignee to receive and take charge of his goods. To this charge as given, and to the refusal to charge as asked, the defendant also excepted."

The charges given, and the refusals to give the several charges asked, are now assigned for error.

P. HAMILTON, for the appellants :

The case presents two leading questions for solution :

1st. Does the risk assumed by the assurer extend to the city of New Orleans, or does it terminate at the terminus of the voyage of the boat ?

2d. Was there a safe landing of the 134 bales, so as to discharge the liability of the underwriter, or does the term "*until safely landed*" mean till safely delivered to the consignee ?

The ruling of the court, in substance, was that the liability of the underwriter continued till the goods reached the city of New Orleans-- that is, that it was co-extensive with the responsibility of the carrier ; and that whether that were so or not, still, to be safely landed, the goods must be safely delivered to the consignee, or some one for him, at the place where it was usual for the consignee to receive his goods. The evidence was, that the goods are, by the *terms of the contract with the boat*, deliverable to the consignee at the depot in the city ; so that in truth the court below decided one single question, to-wit : That the contract of assurance in this case covered the goods till they were landed in the city, at the place where it was usual for the consignee to take charge of them ; and being destroyed by a risk within the policy before they reached that point, the plaintiffs were entitled to recover. These decisions, which run through the whole charge of the court, and exhibit themselves in the refusals to

charge as requested by the defendant, are objected to as erroneous.

1st. As to the extent of the risk assumed by the defendant : The policy is a *marine policy*: the risk assumed is the risk named, on goods described, while on a certain vessel named, and on a certain voyage also described. It falls within the very definition of a contract of marine insurance.—1 Phil. Ins. 1 ; 1 Duer's Ins. 58. The policy describes the risks as "of the seas," &c., being on 198 bales of cotton from the port of Mobile to the port of New Orleans, on the steamer Helen, "*beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof, on board of the said vessel (the Helen) at the port of Mobile, and so shall continue and endure until the said goods and merchandise shall be safely landed at the port of New Orleans,*" and is the same form of contract to be found in all the books on Marine Insurance, as belonging to that policy in all commercial countries. 1 Arnould Ins. p. 20. The contract is attached to the goods while *in transitu* on the voyage described, and in the vessel described ; it covered the goods during the voyage of the Helen : when that voyage was safely terminated, the contract of insurance was terminated. Both parties to the contract are chargeable with knowledge of the course of this trade. Arnould Ins. p. 43. Both parties, then, knew that the Helen did not and could not go to the city of New Orleans : they contracted then for insurance so far as the Helen went ; they named that vessel as the vehicle of transportation, and very properly, too.—1 Arnould Ins. 170. The insurance, by the terms of the contract, is co-extensive with the voyage that in the usual course of trade would be made in the Helen—the vessel named in the policy. The contract is for indemnity against loss on a voyage by the Helen, from the port of Mobile to the port of New Orleans, beginning the adventure with the loading upon the Helen, and continuing till safely landed at the port of New Orleans.

Now, what is meant by the term 'port of New Orleans' is to be ascertained by the opinions of mercantile men, cognizant of the usages of trade.—1 Arnould Ins. 342, 434, 77 ; 1 Burr. R. 349 ; 3 Camp. R. 16, 300 ; 1 Bingh. R. 445 ; 2 Taunt. R. 406. And this definition is not governed by geographical or



political divisions. The port of New Orleans, in mercantile understanding, embraces the wharves on Lake Pontchartrain, as well as the levee on the Mississippi river. According to this understanding, the *Helen* was at the port of New Orleans when she reached her usual wharf at the end of the railroad, and the marine policy there ceased. It had no operation on land, or after the goods had been discharged from the vessel on land, where it was customary for the vessel to discharge. It is admitted that lighters, or vessels used to transport goods from a vessel to the shore, are generally deemed part of the ship, and goods while so laden continue covered by the policy; but in order to have that effect, they must be vessels of water carriage: if the goods reach the land, the maritime service is performed. If there be two modes of transporting goods from the ship to their port of destination—one by boats, and another by land—if that by boats is adopted, the insurance still covers the goods; if that by land is used, the insurance ceases, though the liability of the carrier continues, whichever be adopted.—5 Martin's R. N. S. 386; 2 Mass. 426; 1 Arnd. Ins. 437; 4 T. R. 206; 6 Mass. R. 179; 1 Burr. R. 341-9. So in this case, the policy covered the goods till they reached the terminus of the voyage of the *Helen*, to-wit, the wharf on Lake Pontchartrain; the land carriage beyond that point was not covered by the policy.—3 Camp. R. 161; 1 Arnd. 437.

The propriety of this construction of the policy is confirmed by the evidence of the only two cases that had occurred prior to this loss, where the question had been considered by insurers and insured. A large premium was demanded, and paid, for the additional risk contracted, and the policy in its terms is made to extend to *New Orleans*, instead, as in this case, to the PORT of *New Orleans*. These instances establish the custom in Mobile, and are binding upon the parties.—1 Bing. R. 61; 23 Ala. R. 420; 14 How. R. 362.

2. As to the landing of the cotton from the boat:

The proof is, the boat arrived at the wharf as usual, and as usual began to unload her cargo, on to the wharf. She had so unladed from her, and had landed on the wharf, 134 bales of the plaintiffs' cotton, when the fire occurred, which destroyed the wharf and all the goods thereon. "The landing



had been in all things as was usual and customary with the Helen, and nothing more remained to be done by the crew and officers of the Helen, *about the landing of said 134 bales:*" but the obligation of the boat continued on its contract, evidenced by the bill of lading, and confirmed by the custom of the boats to transport the goods to the city of New Orleans. When thus on the wharf, the crew of the boat usually exercises no further control over the cargo—it is then ready to be taken, and transported to its place of final destination by the railroad company. Of course, the obligation of the boat still continuing to transport it on, it would be incumbent on its officers, as common carrier, to keep charge of the goods, though landed from the vessel, not only on the wharf, but until they were laden on the cars, and even delivered to the consignee in the city.

The question here, however, does not relate to the duties of the boat, nor what description of delivery of the goods will discharge the liability of the boat; but is, what is a *safe landing*, to discharge the liability of the underwriter. The two contracts (of carriage and insurance) are not by any means co-extensive—they may very well begin and end at different periods of time, and in very different places. It is true they relate to the same subject, (in this case 198 bales of cotton,) but the liability in the one case does not at all ascertain the liability in the other. They are two entirely different and distinct contracts, made by different parties, and by no means imposing the same liability. The carrier undertakes to carry from point to point, and *to deliver safely and in good order to the consignee*, certain specified perils alone excepted.—Ang. on Carriers, § 282. The underwriter on a marine policy nowhere undertakes for the *delivery*, but only contracts to indemnify the insured against losses from certain perils *while in the process of marine transportation*; and his liability is by the contract made to cease the moment the goods are safely landed.—See 1 Arnd. Ins. pp. 11, 12; *ib.* 432, 433. Mr. Arnould (vol. 1, p. 339) remarks,—“In order to charge the underwriter, it is not enough that the loss should have happened at sea: it must also have taken place in the course of a navigation comprised within some given period of time, or *between two local points* specified in the policy, as the limits

or termini of the risk. In a policy on goods, the risk commences at the port of lading; the terminus *ad quem*, or point at which the risk ends, is the port of the cargo's discharge."

In our view, the court below erred in not sufficiently distinguishing between these two liabilities: he made the liability of the insurer co-extensive with that of the carrier. The carrier, in general, is bound to deliver the goods he undertakes to transport, to the consignee, or he must show a discharge of the goods under circumstances such as the custom of the trade, and by consequence the law, deems equivalent to such personal delivery; and very properly, too, for the carrier has the personal charge of the goods: they are placed in his care and custody. But not so with the insurer: he has nothing to do with handling the goods; he cannot deliver the goods, nor superintend the delivery. If so, he would be very much in the power of the carrier; and, unless he undertake it expressly by his contract, should not be held to a guaranty of his conduct. The insurer undertakes against the barratry of the master, but he assumes no other risk; and any loss that can be traced to the negligence or misconduct of the master, not amounting to barratry, must be borne by the vessel, and not by the insurer.—14 How. R. 351, 367. If the loss in this case arose through the negligence or misconduct of the master, in landing the goods at an unseasonable hour, or in an improper manner, the insurer is not liable. The assured, and not the insurer, warrants the competence and skill of the crew.—1 Arnd. Ins. 681. This falls within the implied warranty of seaworthiness.

We insist, then, that a delivery of the goods to the consignee, or some one for him, is not necessary to discharge the underwriter, even though it were necessary to discharge the carrier. All that is necessary to discharge the insurer is, that the goods should be safely transported on the voyage described, and safely delivered, or discharged on land from the vessel, at the usual place of landing. The connection between the vessel and goods must be severed by the safe discharge of the goods on the usual pier or wharf. When that is done, the voyage is ended—the contract of assurance has been performed. Mr. Arnould defines "SAFELY LANDED," to mean "*safely delivered on shore, at the ordinary wharves and*

quays, or customary landing places, within the limits of the port of discharge.”—Vol. 1, p. 434. And again, p. 437,—“Whenever the goods can be considered as *having been landed according to the usual course of business*, at their port of destination, the risk on the goods ends, though they may *never have been delivered into the hands of the consignees*.” And again, (same page,) “The general rule is clear, that the underwriter in a sea policy insures only against sea risks; the risk on goods, therefore, ends, directly they are put on *terra firma*, unless they are placed there only for a temporary purpose, or under such circumstances as to be protected by the usage of the trade;” as in the Bank-saul case.—1 Burr. 341. So Lord Ellenborough, 3 Camp. R. 161,—“The goods were landed according to the usual course of trade at the port of Archangel. This is all the underwriter undertook for. The policy says nothing of the goods being in the possession, or under the control of the consignees. \* \* \* “If the goods are once landed in the usual course of business, the underwriters are not liable for any subsequent loss. It was meant to indemnify against marine, and not terrene perils.” In this case (3 Camp.) the goods were taken possession of by Government officers, before the vessel reached the land, and were never seen by the consignees. A similar case is found in 8 Cranch R. 75. In both cases, the goods were held to be safely landed within the policy. In the case at bar, the record shows a landing had been made of the 134 bales, in all things as *was usual and customary* in this trade, and that *nothing more remained to be done, about the landing of this cotton, by the officers and crew of the boat*. It thus shows a complete landing or severing of the 134 bales from the boat, the vehicle of transportation, at the end of the voyage, at the place and in the manner usual in the trade, within the terms laid down by the authorities upon this subject; and appellant contends the risk assumed by him had terminated, and the policy was complied with.

The appellant's contract was only to indemnify against certain dangers *while on the voyage from Mobile and until safely landed at the port of New Orleans*. It is well settled, in such a case as this, that the customary place of landing her cargo by the vessel insured upon would be the place at which



the voyage would be construed to terminate; that place was indisputably the wharf at Lake Pontchartrain. Our contract was, then, only to indemnify the assured against the losses which might come to the goods while on board the vessel, on the voyage from Mobile to the customary wharf of the Helen, at Lake Pontchartrain, and *until there safely landed*. Now what is meant by *safely landed*? Our contract was a maritime contract. It was confined by its terms to the dangers of the voyage, and the very essence of it was the protection of the assured against the dangers of the *navigation* between the two termini of that voyage. When, then, we speak of the goods being *safely landed*, it is evident we mean the goods are to be landed so as to be *secure from the perils of the voyage*; and, this being done, our contract is complied with. We contract only to furnish the assured with indemnity *against the marine, and not against the terrene risks*. We contract that assured shall not suffer from the perils of the voyage—not that we will protect them from perils accruing *after the voyage is at an end*. The goods, then, having reached the wharf at Lake Pontchartrain, which is shown to have been the usual and proper place of discharge, and the goods having been there discharged on terra firma, at the customary place, and in the customary mode, and nothing more remaining to be done with them by the boat, which was the vehicle of *marine transportation*; surely, all the marine transportation was at an end, so far as the goods in question were concerned. The marine risks had been run, the perils of the voyage were at an end, and the goods were safely landed within the meaning of the insurance policy.

The case 6 Mass. R. 197 was decided on this principle, that a complete severance of goods and vessel had not taken place, according to the custom of the trade. A box of opium was taken ashore, for the purpose of trading with the natives, and was intended to be delivered to the chief, in pursuance of a previous bargain then to be completed. But foul play was suspected, and the opium was returned to the boat; and while there was seized by the natives, and forcibly taken from the master of the vessel. In this case, no landing had taken place, according to any regular custom of the trade, nor had the crew placed the opium on land, as an ending of the voyage



as to it—the duty of the crew as to it had never been fully terminated. It is true, the facts show that 134 bales only, and not the whole 198, had been landed. The remaining 64 were, however, received by the consignee without objection that the whole were not tendered to him. Even upon the notion that the contract was entire, and that plaintiff, or his agent, the consignee, was entitled to insist that the whole shipment should be landed before his policy ceased to protect him, he has himself severed the contract by accepting, without objection, a portion instead of the whole, and is not entitled to insist upon the objection. Besides, it was not necessary the whole should be landed; it is sufficient if the bulk of the shipment be landed.—1 Arnd. Ins. 441. In this case, the bulk, or the larger portion of the shipment, was landed in the usual manner, before the loss occurred. Moreover, this contract was, at its inception, a severable contract, and the landing of each bale of cotton covered the contract as to that bale. Any other construction of the contract would lead to monstrous injustice.

Even if we apply the same rule to the insurer that is applied to a carrier in an analogous case, we find that what is a delivery depends on the custom of the trade. We contend, that in this case the duty of insurer and carrier is not commensurate, because the liability of the carrier extended to a delivery of the goods at the city, while that of insurer terminated with the voyage—that is, at the wharf. But if the carriage terminated at the wharf, what facts would amount to a delivery must be determined by the custom: the custom of the boat would settle the question; and a shipper by the boat would be held by that custom.—Flanders on Shipping, p. 278; Angell on Carriers, 298, 314–15; 16 Verm. 52; S. C. 18 *ib.* 131; S. C. 23 *ib.*; 1 Bail. R. 553; 17 Wend. R. 305–6; 1 Parsons on Contracts, tit. Com. Carrier. If no notice of the arrival of the boat was required by the custom, notice was not necessary. The *Helen* was a regular packet, and had regular times of arrival and departure, and a regular place and manner of lading and of receiving her cargo.

The charges asked were all proper and correct, and should have been given. The fact sufficiently appears that the jury were misled by the ruling of the court below, and that too

much stress was laid on the liability of the carrier as furnishing the rule for the insurer. It is respectfully submitted, that the court mistook the principle on which the cause should be decided.

ROBT. H. SMITH, *contra*:

1. The first question to be arrived at is, what was the charge of the court; for it is an error to suppose, as contended by the appellant's counsel, that the charges, all taken together, assert the doctrine, that the risk continued until the cotton was delivered to the consignee, or to some one for him. It is certainly true that the original charge asserted this proposition; but it was expressly retracted by the qualification of the seventh charge asked, which asserted, that the risk was terminated if the goods were landed from the boat at the usual place of unloading her cargo, and in the mode and manner customary in the trade, and that it was not necessary that the goods should be actually delivered to the consignee. In the explanation given of the fifth, sixth, and seventh charges, the principle is asserted, that the risk continued until the goods were landed at the place where it was usual for the consignee to take charge of them; and in this the court but followed the language of C. J. Marshall, in *Gracie v. Marine Insurance Co.*, 8 Cranch's R. 81, which opinion, it will be seen from the language used, the court read to the jury. The error in giving the charge in the first place, that there must be a delivery to the consignee, or to some one for him, is cured by its subsequent withdrawal.—*Smith v. Maxwell*, 1 S. & P. 221.

2. Was there a safe landing of the 198 bales? The undisputed facts were, that while the boat was unloading, and when she had only thrown off 134 bales, those 134 bales were consumed. The policy, by one entire contract, covered the whole lot of cotton at one gross sum; and if there was no safe landing of any part, within the meaning of the law, until all were safely landed, then the court might very properly have told the jury, 'It is conceded that, when the loss occurred, only part of this cotton was landed; but the risk continued on all of it until the whole was safely landed, and a part being burned before the whole was landed, the underwriters are liable for that which was lost, even though the boat were at the

port of New Orleans.' This is the law of the case, unless there is something in a contract of insurance which exempts it from the effect of a rule applicable to all other entire contracts.—See the cases collected in Reavis' Digest, pp. 351–54; Evans & Arrington v. Keeland, 9 Ala. 51; Chitty on Contracts, 7th Amer. edit., pp. 446, 447, 737. That this is also the law of contracts of insurance, is well settled.—3 Kent's Com. 309; Gardiner v. Smith, 1 Johns. Cas. 141; 1 Arnould on Insurance, p. 434, note 1; Gracie v. Marine Insurance Co., *supra*. It matters not, then, whether other parts of the charge were correct or incorrect; for, these facts being ascertained, the plaintiff was bound to recover, and the other charges, even if erroneous, could have worked no injury, and consequently furnish no ground of reversal.—Donley v. Camp, 22 Ala. 659; Porter v. Nash, 1 *ib.* 452; Caruthers & Kinkle v. Mardis' Adm'rs, 3 *ib.* 599; Mayor v. Emanuel & Gaines, 9 Port. 403; Horton v. Smith, 8 Ala. 73; Randolph v. Carlton, *ib.* 607; Smith v. Houston, *ib.* 737; Shepherd v. Nabors, 6 *ib.* 631.

It is attempted to answer this proposition, by saying that an acceptance of the part saved was a waiver of this. This position amounts to this: If the bales burned had been lost at sea, then, by receiving those not lost, we would have waived all claim to anything for those lost. But the correct proposition is, that if we had a right to insist on a total loss, it would have been a waiver only as to that received. For the appellee it is contended, that we were bound to receive the bales which were not at all injured, and that all we could have claimed payment for was a *total partial loss*. The risk continued as to the whole until all were safely landed, and therefore the lost bales were covered by the policy when destroyed; but it does not follow that we were not bound to receive those which were uninjured. These latter were under the policy at the time, but ceased afterwards to remain under it, by being saved and delivered. The general rule of waiver of performance of contracts has no application to a policy of insurance, because it is a contract of indemnity merely, and the measure of recovery is the loss sustained. If the loss is only partial, it does not justify the insured in going for the whole policy: he must receive the part saved, and can only ask indemnity



for that lost.—Franklin Fire Ins. Co. v. Hamill, 6 Gill's R. 87; 1 Arnould on Insurance, p. 8.

There has been some contrariety between the decisions of England and those of America, as to whether the insured can go for a total partial loss of goods which, by the memorandum to the policy, are free from average—that is, whether, if part of the goods, which are in separate parcels, are lost, and part are uninjured, and the goods are by the policy and memorandum of that class for which the insurers are not bound for an average loss, the insured can recover for a total loss of those separate parcels which were destroyed; or whether, the insurance being a whole thing, and the articles not subject to an average loss, the insured himself must bear the loss. It is well settled in England, that although the insurers are by the policy exempted from accounting for anything less than a total loss; yet, when the thing insured consists of several distinct parcels, some of which are totally lost, and some uninjured, the insured may recover for the whole value of the part destroyed, for and on the ground of a total partial loss. But this doctrine has been denied in America, and it has been here held that the insured, in such cases, can recover nothing. Arnould on Insurance, vol. 2, pp. 1041–45; Hill v. London Assurance Co., 5 Mees. & W. 559, and note. As plaintiffs' cotton was not among the articles which by the policy are exempted from average, the doctrine, no matter how held, has no influence on the case at bar, further than to illustrate the principle, that at all events, and whether the law be as ruled in England or America, we were bound to receive the goods which were uninjured. When received, the question might come up, if they were memorandum articles, whether we could go for any loss, or whether we could treat it as a total loss of part. But the question discussed never could arise, except upon the predicate that the insured were bound to receive the goods which were uninjured. These authorities (and the American more conclusively) establish that, where there is a partial loss, the insured cannot recover for more than a partial loss, and consequently is bound to receive the goods not damaged or lost.

It is well settled, that though the existing state of things at the time of abandonment be such as to justify an abandon-



ment for a constructive total loss; yet the right of the insured to recover for more than an average loss depends upon the facts existing at the time the action is brought—that is, conceding for argument that, on the burning of the 134 bales, we might have abandoned for a constructive total loss; yet, inasmuch as it subsequently turned out that the loss was only partial, we could only recover for the partial loss. It follows, then, that we rightly received the sixty-four bales not burned, and were compelled to receive them; and this being so, the act was no waiver of any right.—Arnould on Insurance, vol. 2; ch. 8, pp. 1059–60, and the chapter generally.

Suppose, however, that the insured had a right to reject the 64 bales which were saved,—the insurers tendered them, and they were received; how can this be a waiver of anything but the (supposed) right to treat them as lost? how can it be an admission that the other cotton, in a different condition as to landing, was landed? The doctrine asserted is this—because it is admitted that one part was afterwards safely landed, therefore it is an admission that other cotton, burned up before this had left the boat, was also safely landed.—Chitty on Contracts, pp. 446–7. This question, though not prominently presented, is in fact decided in *Alrich v. Equitable Ins. Co.*, 1 Woodbury & Minot's U. S. C. C. Rep. 273.

3. If necessary to proceed further with the argument, it is contended that there was no safe landing of any part of the cotton. It must not only be landed, but “safely landed”—that is, placed in safety on *terra firma*; so landed as to be beyond immediate danger. It never was safely landed; for, in the very act of being rolled off, it took fire; and who can say which of the bales were landed while the fire was burning, and which not? Cotton so rolled off at night, without any one to receive it, or protect it against fire and other casualties, cannot be safely landed; and, even if so landed at the city, it would not be a termination of the risk.—*Gardiner v. Smith*, 1 John. Cas. 141; *Mass. Fire & Marine Ins. Co. v. Parsons*, 6 Mass. 197; *Pelly v. Royal Exchange Co.*, 1 Burr. 341; *Gracie v. Marine Ins. Co.*, *supra*.

4. By the custom of the trade, the voyage was partly a land risk, and its terminus was the railroad depot in the city, although the boat in fact stopped at the lake, and employed the

railroad as a tender to complete her trip. It is well settled, that goods are considered on board of the ship, while in a lighter or shallop, in all cases where, by the usage of the place or trade, it is customary to unload by lighter or shallop. Though the ship may be at her usual place of mooring, or incapable of proceeding further, and though the goods be in a lighter or shallop; still, under the policy, they are on shipboard.—Arnould's Ins., vol. 1, pp. 435-6, and cases there cited. Although the wharves at Pontchartrain, in general mercantile usage, may be considered as the port of New Orleans; yet, by a further well-known usage of trade, steamboats from Mobile take their cargoes to the city, employing the railroad as their agent to perform a part of the trip, for the whole of which the boat is bound. The trade considers the goods on board of the boat until landed in the city. The contract was made in reference to this usage; and no reason is perceived why the goods, when on the railroad, may not be considered as on the steamboat, as well as goods on a lighter or shallop may be considered on the ship. In either case, it is a departure from the letter of the contract, to arrive at its spirit and intent. The port of New Orleans, in the sense of both insured and insurers, was the port of New Orleans as understood and meant by the vessel engaged to carry the goods insured. The question is, not what was the port of New Orleans in a general sense, but what was it as to this shipment. If it is said, this is a marine policy, and how can it cover a land risk; the answer is, just as well as a policy, covering goods while on a named ship, continues though the goods have left the ship safely and are on another and a different vessel. It is the intention of the parties to the contract, solved by custom, that enlarges the sense of words which have a more limited meaning in ordinary signification. There is no greater difficulty in treating the railroad carriage as a part of the boat's trip, than there was in treating the goods as still on shipboard when they were actually on land, as was done in the cases in 1 Burr. 341, 6 Mass. 197, 13 Pick. 543. Suppose a boat is navigating a stream where, by means of a rapid or shoal, all boats have to unload and send their cargoes around the obstruction by a railroad or canal, the boat going through light and continuing her voyage; and that a loss should occur on the railroad or canal;—would it be con-

tended that it was not covered by the policy? The insurance in this case continued while the goods were on the boat, and until safely landed at the place for which the boat is bound, not corporally, but by herself or agent; and that place was the railroad terminus in the city.

It is no answer to this, to say that a higher premium would be charged for voyages by water to the city. It does not follow that the insurer would not charge less, when part of the trip was to be made by railroad, which is a safer mode of conveyance, and by the use of which the boat is able to make an inland voyage. It is not to be presumed, in the vast demands of commerce and all the anxious solicitude it brings, as well as the keen penetration and guarded caution it produces; and in this day, when insurance is the great stay and support of commerce, that the vast millions of goods passing between Mobile and New Orleans should have gone over this road without insurance. Yet no case could be shown, where it was ever pretended that goods on the road were not considered as protected by the marine policy. The appellant showed two cases, where the anxieties of commerce had taken policies to cover goods to New Orleans, and while in warehouse there. Such was the risk "proposed and taken." These two cases establish no usage.—*Adams v. Otterbank*, 15 How. 539. But they are very persuasive to show that these two individual transactions furnish the only evidence that could be adduced, from which even an argument could be drawn in favor of the termination of the risk short of the city. They tend strongly to prove, either that commerce has shown herself so blind as to have passed her millions annually over this road without insurance, or that the construction we insist on is correct; for it cannot be presumed, if any other case in point could have been given, that the positive proof would not have been made. It will be observed, too, that the boat's bill of lading says, "to be delivered at the port of New Orleans"; and the policy says, the risk is to terminate "at the port of New Orleans." The usage shows that the expression, in the bill of lading, means the city itself; and yet the court is asked to tell the jury, that the same words in the policy, which was entered into in reference to this boat, mean the wharves at Lake Pontchartrain.



CHILTON, C. J.—It is a rule of construction, settled by numerous authorities, that every usage of trade, which is so well settled, or so generally known, that all persons engaged in that trade may fairly be considered as contracting with reference to it, is regarded as forming part of every policy designed to protect risks in that trade, unless by the express terms of the policy, or by necessary implication, such inference is repelled.—1 Duer on Ins. 195, §§ 42, 43; *ib.* 265, §§ 60, 61, 62; Arnould on Ins. (1850 edit.) p. 65; Hughes on Ins. 109–10; 1 Phillips on Ins. (edit. 1853) 79, *et seq.*

The contract declared on is essentially a *marine* policy, providing for protection of goods shipped on board the Helen, upon a *sea voyage*, and against *sea risks*; and there is nothing contained in this policy which, by a fair construction, can be made to extend to and cover *terrene risks* after the cotton shall have been *safely landed* at the usual place of discharging her cargo by the vessel; unless, indeed, under the facts, we are required to hold that the port of New Orleans means the port at the city, and not the port which is known by the same name on Lake Pontchartrain, where the cargo was put on shore.

It is conceded, that the policy is to be construed liberally for the benefit of the assured, and with a due regard to its design and object as an undertaking to indemnify.—Kent v. Bird, Cowp. R. 585; Godsall *et al.* v. Boldero, 9 East, 72, 82; Hughes on Ins. 145, marg. page;—per Lord Ellenborough, in Bainbridge v. Neilson, 10 East, 144; Pelley v. Royal Exchange Assurance, 1 Burr. 349; Wolfe v. Horncastle, 1 Bos. & Pul. 322; Kains v. Knightly, Skinn. 55; 3 Saund. R. 200 a, note 1. “It is certain,” said Lee, C. J., in Pelley v. Royal Exch. Ass., *supra*, “that in construing policies, the *strictum jus*, or *apex juris*, is not to be laid hold on; but they are to be construed largely for the benefit of trade and *for the insured*. Nevertheless, as was said by Lord Ellenborough, C. J., in Robertson v. French, “the same rules of construction which apply to all other instruments, apply equally to this instrument of a policy of insurance—namely, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect of the subject-



matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments, in this respect, is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject, indeed, always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general *formula*, adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."—4 East, 135-36.

The language in the policy before us, as we have said, provides against loss from certain perils, while the goods are in process of *marine transportation*. They are shipped on board the *Helen*, upon a *voyage* from the port of Mobile to the port of New Orleans, enumerating the perils and adventures usually inserted in *marine* policies; and it fixes the *termini* of the risk, the point *a quo* being the port of Mobile, "and to continue and endure until the said goods shall be safely landed at the port of New Orleans."

We must not confound the obligation of the insurer with that of the carrier. The boat, by the bill of lading, was obliged to have the cotton taken to the city, and the consignees were not bound to receive it at the lake depot of the railroad; but it by no means follows, that the insurance extends to this terrene transportation. According to its terms, it closes with the terminus of the voyage of the *Helen* after the goods shall have been safely landed. There is no proof whatever to show that such policies were regarded by merchants, insurers, or shippers, as usually embracing such

risks, and we have found no case which authorizes the extension of a marine policy to cover land transportation. Whether, indeed, it would be competent to extend the language employed in this policy, by proof of usage or custom, so as to make it cover losses after the goods had been safely landed in the usual way and at the usual place of discharging the cargo by the *Helen*, is a question of some difficulty; and one which we are not now called upon to decide. So far as the proof goes upon this point, it is adverse to the construction contended for by the assured; two cases being shown where policies had been effected "*to New Orleans*", instead of the "*port of New Orleans*", in which it was considered by the parties that the risk continued to the city; but in both of those, a greater premium was paid than required to insure to the "*port of New Orleans*", as understood to be the point of discharging the cargo at the southern shore of Lake Pontchartrain. But we lay no stress on these cases as establishing a custom. We rest our decision upon the *terms of the policy itself*, considered, of course, with reference to what is usually done by such a vessel, with such a cargo, in such a voyage; all which must be considered as forming a part of the policy, as much so as if inserted in it.—1 Burr. 350; 3 Saund. 200 a, n. 1. Both the assurer and insured are chargeable with a knowledge of the course of this trade, and are presumed to contract with reference to it.—*Noble v. Kennoway*, Doug. 510; *Salvador v. Hopkins*, 3 Burr. 1712; *Vallance v. Dewar*, 1 Camp. 505, n.; *ib.* 508; 3 *ib.* 200; 1 Taunt. 463; Selw. N. P. 963; 1 Arnould Ins. 43; *ib.* 66; *Hughes Ins.* 146, bottom page.

The parties, then, knew that the *Helen* landed her goods at the port of New Orleans, *on the wharf at Lake Pontchartrain*. They knew this vessel did not go to the city of New Orleans;—they insert no words in the policy making the liability of the insurance company co-extensive with that of the carrier, nor extending it beyond a "*safe landing of the goods*" upon the *termination of the voyage*; no custom or usage is shown to extend the *voyage*, and of consequence, the risk, to the city of New Orleans; and such being the case, we should do violence to the terms of their contract to continue the risk after the voyage had terminated and the goods were safely

on land at the usual place of discharging them. The risk is at an end, whenever the goods can be considered as landed according to the usual course of business, at the accustomed port of destination, although they may never have been delivered into the hands of the consignees.—1 Arnould on Ins. 437; Galliffe v. Bourne, 4 Bing. N. C. 314; same case, in House of Lords, 7 M. & Gr. 850.

It follows from what we have said, that the court erred in the charges, which held the insurer liable until the goods were delivered to the consignee, or some one for him. So, also, in the qualification given to the charges asked, which assumed that the goods must be landed at the place where it is usual for the consignee to receive and take charge of them. The delivery to the consignee, as well as the usual place where he was accustomed to receive and take charge of the goods, could not affect the liability of the insurer, so as to extend the risk beyond the terminus of the voyage. These were questions between the consignee, or owner, and the carrier. It was certainly competent for the parties to contract for covering losses which should come to the goods upon their marine passage and until safely landed, leaving their overland passage unprotected by the policy. This, we have held, was the effect of the policy before us; and as the terminus of the marine risk was not the terminus of the transportation contracted for by the carrier, it was erroneous to make the liability of the insurer depend either upon the delivery of the goods to the consignee, or at a place where he usually received and took charge of them.

The next question which arises is, did the errors which we have noticed injuriously affect the rights of the insurer. If they did not, we cannot reverse; for it is well settled, that an error which can do no injury, works no reversal.—Porter v. Nash, 1 Ala. 452; Caruthers v. Mardis' Adm'r, 3 *ib.* 599; 9 Por. R. 403; Donley v. Camp, 22 Ala. 659; 8 *ib.* 737, 37.

If the contract was entire—if, in other words, the engagement to safely land the 198 bales of cotton was not complied with until the whole were landed in safety, then the errors of the court worked no injury, since it is conceded that only 134 of the bales were landed, and these were consumed by fire before the others were put on shore.



Waiving the fact, that the first count in the complaint expressly states that the cotton was valued at \$50 per bale, and the statement contained in the bill of exceptions, that "the plaintiff proved the contract of insurance with the defendant upon 198 bales of cotton, valued at \$50 per bale," &c.; we think the contract must be regarded so far severable as to exonerate the underwriters for that portion which was safely landed. The contract is one of indemnity. The valuation is inserted by the agreement of the parties, that in case of loss, proof of value may be dispensed with. But where the articles are separate, and each parcel is unaffected in value, whether considered separately or aggregately, there is no good reason why the failure safely to land one bale should make the underwriters liable to pay the aggregate value of the 198 bales. It could not be maintained that the underwriters would have been exempt from liability if the appellees, after effecting the policy upon the 198 bales, had only shipped 197, and these had been destroyed by some of the perils embraced by the policy. They could not be allowed to say, "True, the loss has accrued by reason of a risk insured against; but the assured failed to ship the number of bales specified in the policy, and the contract was entire: we must be liable for the 198 bales, or for nothing." The rule is, that if less than the number specified in the policy are shipped, the assured has the right to demand a corresponding return of the premium.—2 Arnould on Ins. 1227. We think the cases of *Gracie v. The Marine Ins. Co.*, (8 Cranch, 75), and *Gracie v. The Maryland Ins. Co.*, (8 Cranch, 84), fully sustain the view we have above taken. In the latter case, a part only of the cargo was landed, and the policy provided for the continuation of the risk "until the said goods shall be safely landed," &c. If no part of the goods could have been "safely landed" until the whole were landed, then, in that case, there would have been a total loss, and the assured would have been unaffected by the warranty against particular average loss. But the court held otherwise, and discharged the underwriters, upon the ground that the loss was partial, a portion of the goods having been safely landed within the meaning of the policy, and hence the assured was affected by the warranty against particular average.



We have seen that the consideration for the insurance, the premium, is susceptible of apportionment—to-wit, three-sixteenths on the value of the cotton shipped; and that each bale may be severed from the others without affecting its value. The true rule, then, in such cases, is to consider the contract as entire with respect to each measure, and not in respect of the whole lot.—Story on Con. § 24, n. p. 18; *ib.* § 21, *et seq.*

The case of *Gardner et al. v. Smith*, 1 Johns. Cas. 141, is relied upon by the counsel for the appellees. In that, by the terms of the policy, the risk was to continue until twenty-four hours after the goods named in the margin were landed; the risk providing against seizure of the goods as illicit trade. A portion of the goods had been landed more than twenty-four hours, when the whole were seized as illicit. Justice Lansing said, “The insurance being entire, we are of opinion, that the risk continued on the entire goods, until twenty-four hours after *all* of them were landed.”

Perhaps a distinction may be taken between the case cited and the one before us; but if it be parallel, we are not disposed to follow it. Nor are we alone in doubting its authority. An able writer upon the law of insurance does not “hesitate to doubt it, and to state it as the better doctrine, that the risk terminates on each parcel at the end of the twenty-four hours after it is landed.”—See 1 Phillips on Ins. (edit. 1853), p. 539, § 972.

After the best consideration we have been able to bestow upon the case, we are satisfied the court below mistook the law in the charges which conflict with the views above expressed. The judgment is, therefore, reversed, and the cause remanded.

## BURDEN vs. STEIN.

[BILL FOR INJUNCTION TO RESTRAIN DIVERSION OF WATER FROM PLAINTIFF'S MILL.]

1. *Riparian proprietor may enjoin in equity without first establishing his right at law.*—Equity will entertain a bill for injunction by a riparian proprietor, whose title is clear, to restrain a diversion of the water from his mill, without requiring him first to establish his right at law, or to allege that he has been in possession of the land for three years: such a bill may well be supported on the ground that complainant cannot obtain full reparation in an action at law for damages, and, further, because the injury may involve the necessity of a multiplicity of suits.
2. *Reservation of right to divert cannot be implied, as against vendee with absolute conveyance, in favor of strangers.*—The absolute deed of a riparian proprietor conveys the right to the undiminished flow of the stream, and no reservation of a right to divert can be implied from the fact that, at the time of the execution of the conveyance, he diverted the water to supply a mill on another tract of land owned by him; especially when the claim is set up by a stranger.
3. *Laches does not affect plaintiff's right to enjoin.*—In cases where the plaintiff's right is not clear until established at law, equity will refuse to enjoin, if it is shown that he has been guilty of any improper delay in applying to the court; but this principle has no application, where his right is clear, and of such a character as entitles him to ask the interference of the court without resorting to law in the first instance.
4. *Right of eminent domain, and its application to the City Water-Works of Mobile.*—The right of eminent domain, in the assumption and appropriation of private property for public uses, is recognized and admitted, and supplying a city with water is admitted to be a public use within the meaning of the constitution; but this right can only be exercised upon making just compensation to the owner, nor does it confer on the lessee of the City Water-Works of Mobile, in connection with the several acts of the Legislature relating thereto, the power to deprive other riparian proprietors of their right to the water of Bayou Chataque, which he can only obtain by pursuing the course pointed out in the statute.
5. *Statute of limitations of six years no defence to this suit.*—The statute of limitations of six years is no bar to a suit in equity to enjoin and restrain an unlawful diversion of water from complainant's mill.
6. *Corporate authorities of Mobile not necessary parties to bill.*—The lessee of the City Water-Works of Mobile, under his lease from the city, can have no higher powers than his lessor had; and if he be enjoined in equity, for an unlawful diversion of water from the mill of another riparian proprietor, his lessor is not a necessary party to the bill.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

THIS bill was filed by John Burden, the appellant, to enjoin

the defendant's diversion of the waters of Bayou Chataque (or Three-mile Creek) from complainant's mill. It alleges, substantially, that complainant is the owner of a certain tract of land on both sides of said creek, on which he has erected a grist mill, at an expense of \$5,000, on a site where a grist mill has been erected for thirteen or fourteen years, and that the motive power of said mill is the water of said creek, as it has been accustomed to flow through said land from time immemorial; that defendant, under pretence of authority derived from certain acts of the legislature, has diverted the waters of said creek, at a point above complainant's land, in such quantities as materially diminish the volume of the stream which would otherwise flow to complainant's mill, and compel him, at divers periods during the year, to stop running his mill for want of water; and that defendant is now engaged in erecting a forcing mill and other machinery, which will increase the quantity of water thus diverted, to complainant's irreparable injury. The prayer of the bill is for an injunction and general relief.

The complainant's title to the land on the south side of the creek, as shown by the exhibits and documentary evidence, is derived directly from the United States, by patent dated March 1, 1850; and his title to the land on the north side is derived under a deed of mortgage, executed by one Jacob Page to the Branch Bank at Mobile, dated November 11, 1837, which was regularly foreclosed in equity, and complainant became the purchaser at the register's sale.

The defendant answered the bill, setting up several distinct grounds of defence, which may be thus stated:—

1. He demurs to the bill for want of equity.
2. He admits his diversion of the water of the creek, but denies that the quantity of the diversion has been increased since complainant became the owner of the land; alleges that his diversion of the water commenced in 1841, without any objection being made by the then owners of the land which complainant now claims; and insists that complainant is precluded from relief by their long acquiescence in the diversion.
3. He insists that the diversion is in pursuance of law, and for public use; that the Mobile Aqueduct Company was incorporated in 1820, and was authorized by its charter to

divert the waters of this creek for the purpose of supplying the city of Mobile with water ; that this franchise afterwards became vested in the city, and was leased to the defendant, by agreement with the corporate authorities of the city in 1840, which agreement was ratified by act of the legislature of January 7, 1841 ; and that under these acts, in connection with his lease, defendant became vested with all the powers of the old Aqueduct Company, and with full power and authority to divert the waters of said creek in sufficient quantities to supply the city of Mobile with water for culinary and domestic purposes.

4. He alleges that Jacob Page, under whom complainant derives title to his mill-site, and who was in possession of said land in 1837 and prior thereto, had another mill on a tract of land above that now owned by Burden, which was supplied with water diverted from said creek by means of ditches ; that this mill was thus supplied at the time said mortgage deed was executed, and that the land on which it was situated (with the mill privilege and appurtenances) was conveyed by said Page to one Anderson, by deed dated December 21, 1841 ; and defendant insists that complainant's rights, as purchaser under said mortgage, are subordinate to Anderson's rights under said deed.

5. He sets up the statute of limitations of six years.

The chancellor held the bill demurrable, for the want of an averment that the complainant had first established his right at law, or had been in possession for more than three years ; and he therefore dismissed the bill. This decree is now assigned for error.

K. B. SEWALL, for the appellant, and F. S. BLOUNT, for the appellee, submitted the case on written arguments, of which the subjoined briefs are abstracts.

#### POINTS AND AUTHORITIES FOR THE APPELLANT.

1. The right for the injury of which complainant seeks redress is the right to the use of the full and uninterrupted flow of the waters of Three-mile creek, as it has been accustomed to flow through his lands from time immemorial ; and this right is not an easement, nor dependent on an easement, but is a right incident to the ownership of the soil—a part of the



inheritance, and passing with it.—Angell on Water-Courses, §§ 5, 90, 91, 92; Wright v. Howard, 1 Sim. & S. 190; 8 Greenl. R. 295; Webb v. Portland Manufacturing Co., 3 Sumner's R. 198; Tyler v. Wilkinson, 4 Mason's R. 397; Mason v. Hill, 5 B. & Adol. 1-26; Wood v. Waud, 3 Excheq. (Wels. H. & G.) 748; Embrey v. Owen, 6 *ib.* 353; Dickinson v. Canal Co., 7 *ib.* 299. His right is established, then, by establishing his right or title to the possession of the land; and if he seeks redress in equity, it is not necessary that he should have first established his right at law. The jurisdiction of chancery, to afford relief in such cases, in the first instance, is founded on the principle of preventing irreparable injury, or a multiplicity of suits, and is established by a long series of adjudicated cases, both English and American. Ewelme Hospital v. Andover, 1 Vern. 266; Finch v. Resbri-ger, 2 *ib.* 390; Bush v. Western, Prec. Ch. 530; Martin v. Stiles & Sherman, Moseley's R. 144; Mayor of York v. Pilkington, 1 Atk. 282; Duke of Dorset v. Girdler, 2 Eq. Abr. 181; Hughes v. Trustees of Morden College, 1 Vesey Sr. 188; Robinson v. Lord Byron, 1 Bro. C. C. 588; Hamilton v. Worsefold, reported in note to Courthope v. Mapplesden, 10 Ves. 291; Lane v. Newdigate, *ib.* 192; Millar v. Taylor, 4 Burr. 2400; University of Oxford v. Richardson, 6 Ves. 707; Han-son v. Gardiner, 7 *ib.* 307; Mitchell v. Dors, 6 *ib.* 147; Gard-ner v. Trustees of Newburgh, 2 Johns. Ch. 162; Belknap v. Belknap, *ib.* 472; Webb v. Portland Manufacturing Co., 3 Sumner's R. 189; Hulme v. Shreve, 2 Green's Ch. 116; Shields v. Arndt, *ib.* 234-45; Belknap v. Trimble, 3 Paige's R. 577, 600; Reed v. Gifford, Hopk. Ch. 418; Hammond v. Fuller, 1 Paige's R. 197.

2. The deed from Page to Anderson, of December 21, 1841, does not estop the complainant in this suit. The land embraced in it does not lie on the creek, and has, therefore, as an incident to it, no riparian rights which Page could convey. So far as the ditch was outside of this land, Page had not even an easement, but was a mere naked trespasser. Aside from this, complainant claims under a mortgage from Page, dated November 11, 1837, more than four years prior to An-der-son's deed, which was regularly foreclosed; and Ander-son's rights, therefore, were entirely subordinate to those of

complainant. But if the reverse was the fact, and complainant's rights were subordinate to Anderson's, this could confer no rights on Stein, who claims under neither Page nor Anderson, but independently of them.

3. The acquiescence of the prior owners of the land, through whom complainant derives title, confers no right on the defendant to divert the stream. In order that the former owners should have lost their right by acquiescence, their acquiescence must have continued such a length of time as, if applied to an adverse enjoyment of the land itself, would have barred its recovery.—Pugh v. Wheeler, 2 Dev. & Bat. Law R. 50; Angell on Water-Courses, §§ 132, 133, 134. There are cases in which acquiescence constitutes an equitable estoppel, because it amounts to a fraud (2 Atk. 83; 2 Vern. 150; Prec. Ch. 37); but there can be no pretence that this is such a case. Watkins v. Peck, 13 N. H. 360; 4 Barr, 353.

4. The acts of the legislature relating to the Water-Works of Mobile, under which defendant claims the right to divert the waters of this creek, neither expressly nor by implication grant him any such right; and courts are not disposed, unless fettered by the express words of the act, to construe a statute in such a manner as to deprive individuals of their property. Stracey v. Nelson, 12 Mees. & Wels. 535; Rex v. Croke, Cowp. 27; 4 Queen's Bench R. 46. If, however, these acts had expressly conferred the power to divert the water, without providing for compensation, they would be unconstitutional.—Constitution of Alabama, art. I, § 13; Amendments to Constitution U. S.; art. V; 2 Johns. Ch. 162, *supra*; Thacher v. Dartmouth Bridge Co., 18 Pick. 501; 2 Harrison's R. 129; Bloodgood v. Mohawk & Hudson Railroad Co., 14 Wend. 51; same case, 18 *ib.* 59; 2 Kent's Com. 392, note.

5. The defendant cannot avail himself of prescription, because his appropriation of the water has not continued long enough to afford any presumption of a grant.—Angell on Water-Courses, §§ 209, 216, 217, 218. He can derive no aid from the old Water-Works, which took the water, not from the creek, but from a spring on the north side of it, and through pipes of three or four inches diameter; and this diversion had wholly ceased, and the charter under which it was made was declared null and void, before the defendant

was authorized to commence his works, which divert the water directly from the creek, and in quantities which materially diminish the flow of the stream.

#### POINTS AND AUTHORITIES FOR THE APPELLEE.

I. The demurrer to the bill for want of equity was properly sustained.

1. The act complained of is consequential in its injury to complainant; and is in fact but a trespass which is cognizable at law. By analogy to the statute of limitations barring suits for trespasses, the bill should have been filed within six years from the commission of the act complained of.—*Nimmo v. Stewart*, 21 Ala. 682. It is no answer to say that complainant was not owner at that time: he is bound by the acquiescence of his vendor. In such a case as this, more than in ordinary cases, it is incumbent on the complainant to apply without delay for redress.—*Agar v. Regent's Canal Co.*, cited in 1 Swanst. 250; *Drewry on Injunctions*, (side) p. 293.

2. The bill is defective for the want of proper parties. It shows that the defendant claims as lessee of a franchise granted to the mayor and aldermen of the city of Mobile, and the prayer is for a perpetual injunction against the exercise of that franchise. The corporation of Mobile, therefore, should have been made a party defendant, since the injunction, if perpetuated against Stein, would not prevent the city from proceeding under the authority granted to it by the legislature.

II. The case is with the defendant on the merits.

The defendant claims as lessee of the city of Mobile. A charter was granted to certain individuals in 1820 (*Toulmin's Digest*, p. 793), vesting in them "the exclusive right and privilege of conducting and bringing water for the supply of the city of Mobile", from some of the running streams in its vicinity, "for forty years"; and this franchise was surrendered by the corporators to the city, then transferred by the city to Hitchcock, and by Hitchcock back to the city; and in 1840, by agreement between Stein and the city authorities, Stein became lessee of the works for twenty years. If the condition annexed to the act of 1820 (*viz.*, that the water should be conducted to the city before the expiration of three years)

was not complied with, the forfeiture (if any) has been waived, and the franchise confirmed. But, independently of this, the complainant in this case could not avail himself of the non-compliance of the corporation with the provisions of the act of 1820 ; nor did the non-compliance of the corporation, *ipso facto*, work a forfeiture of the franchise.—Angell & Ames on Corporations, pp. 503-4, 510-11.

The only material question, then, is, whether the defendant has exceeded the power and authority conferred on him by the laws under which he claims ; and this involves the question, whether the legislature had the right to pass the acts referred to. The complainant claims a common-law right to the flow of the water without diversion as it had been accustomed to flow to his mill ; and if all the riparian proprietors had none other than common-law rights, the claim would be good. But the legislature has declared the running streams of the State to be part of its eminent domain, and has legislated accordingly : in 1820, two days before the passage of the act creating the Aqueduct Company, it was enacted that "it shall not be lawful for any person, or persons, under any pretence whatever, to obstruct or divert any stream of water from its natural channel, which would otherwise flow through the land of any other person"; and the second section gives an action for damages to the party aggrieved.—Toulmin's Digest, pp. 708-9. At the same session, and only two days afterwards, the right to divert the water of this creek is granted to the Aqueduct Company ; and at every session since, the legislature has exercised its sovereign will, without doubt or contestation, whenever the public interest or public health required it—in declaring certain creeks to be highways, and granting privileges to erect dams, mills, bridges, &c., in navigable and unnavigable rivers and creeks. The act of 1820 was one of internal police, and intended as a great public benefit, and it rests on clear constitutional grounds.—City of New York v. Miller, 11 Peters, 139.

The defendant has not exceeded the privileges conferred upon him, nor in any manner departed from the objects of the charter. The evidence shows that 7,900,000 gallons of water flow by a given point on the creek in twenty-four hours, and that the quantity running by a given point from the Water-



Works, which are not supplied from the creek, but from two or three springs which would otherwise run into the creek, is considerably less than 200,000 gallons. The testimony of complainant's witnesses goes to show that one-fourth, one-half, or three-fourths of the entire body of water flowing along the creek, is diverted by the *pipes and ditches*; but it is evident that the pipes, which are eight-inch bore, cannot carry off this quantity of the waters of a creek sixteen feet wide and two feet deep. The ditch, therefore, which conveys the water to Anderson's mill, purchased from Page, must cause the injury inflicted on complainant by the diversion of the water; and with this Stein has no connection whatever. Further, it is shown that Page, under whom both Burden and Anderson claim, granted and relinquished to Anderson the right to divert and use the water of the creek for the benefit of his mill; and as Burden purchased with a knowledge of this fact, his rights are subordinate thereto.

A. R. MANNING, who was of counsel for the appellee in the similar case of *Burden v. Portier*, brought up to this term of the court, submitted a written argument, in which he made the following points:

1. That the long acquiescence of the riparian proprietors of Three-mile creek, in the use of the water for mill purposes, gave to those so using it such an apparent right, that complainant ought not to receive the aid of a court of equity, until he has first established his right at law.—*Weller v. Smeaton*, 1 Cox's Ch. Rep. 101; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515, which is a later case than any English decision cited for appellant; 6 Johns. Ch. 19. The American cases cited by appellant's counsel do not conflict with these: they are cases of protection to those who have undisputed right, or long enjoyment of privileges, while the object of this suit is to disturb such long enjoyment.
2. That the mortgage deed of 1837, under which complainant derives title, should be construed subject to a right in Page to use the water diverted in running the mill which he retained. If the mortgage had been of the property retained, instead of that which was conveyed, Page would have had no right, by reason of his reserving the land and mill-site now

owned by Burden, to destroy the value of the mill conveyed, to the mortgagee or purchaser under the mortgage, by stopping the flow of water, which was essential to the use of that mill, and to the value of the land on which it was situated. It would be bad faith for him to do so ; and it would be equally bad faith for the mortgagee, or the purchaser under him, their places being changed, to destroy by the same means the value of the property retained by the mortgagor.—Nicholas v. Chamberlain, Cro. Jac. 121; Clarke v. Cogge, *ib.* 170; United States v. Appleton, 1 Sumner's R. 492; Hazard v. Robinson, 3 Mason's R. 279; 2 Term Rep. 500.

GOLDTHWAITE, J.—There are cases to be found in the English books, to the effect that chancery will not interfere to quiet the possession by restraining a private nuisance, unless the right of the party has been established at law, or the party has been in possession for at least three years.—Brown's case, 2 Ves. Sen. 414; Vernon v. The City of Dublin, 4 Brown's P. C. 128; Sapcote v. Newport, Carey, 47. But the doctrine as to the length of possession, as was said by Lord Hardwicke in the case first cited, is drawn from the statute as to forcible entries. It seems, also, to be the rule in relation to cases of this character, where the title has not been established at law, and the works have been permitted to remain as long as three years.—Weller v. Smeaton, 1 Cox, 102; S. C. 4 Brown's C. C. 497; Reid v. Gifford, 6 Johns. Ch. 19. But it is doubtful whether this doctrine applies to cases where the plaintiff's title is fully established upon the face of his bill.—Reid v. Gifford, 1 Hop. Ch. 416, 418–19. However this may be, it has no application in the present case, for the bill here is not in the nature of a bill of peace, but an application for the interposition of chancery to prevent an injury ; and in relation to the power and propriety of the interference of this court, in such cases, where the right of the plaintiff is clear, and the injury of such a character as would not admit of full reparation in a court of law, or of such a nature that its continuance would occasion a constantly recurring grievance, which might involve the necessity of interminable litigation, the law is, at the present day, well settled. In such cases, chancery will, by virtue of its inhe-

rent powers, based upon the inadequacy of the legal tribunals to afford full and complete redress, do equity, so far as its preventive powers will allow, by enjoining the wrong-doer from the continuation of his wrong.—Story's Equity, § 925, and cases there cited. And in no cases, of late years, has this power been more frequently exerted, than for the purpose of averting injuries which would result to riparian proprietors from the unlawful diversion of the water to which they are entitled.—Story's Eq. § 927, and cases there cited; Webb v. Portland Manufacturing Co., 3 Sumner's R. 189.

The jurisdiction of equity resting upon the defective powers of the courts of law, it follows that, in all this class of cases, where the title is clear, there is no necessity for establishing the right at law in the first instance.

The case made by the bill falls directly within the principles to which we have adverted. The complainant alleges that he is a riparian proprietor,—that he owns the lands on both sides of the stream, on which he has erected a valuable grist mill, which he is at times compelled to stop working from the diversion of the water by the defendant; and that still greater injury will ensue, if he is allowed to divert the water in the quantity which the additional works he is erecting will enable him to do. We think that, under the rules which govern an action at law, when brought for a wrong of this character, the complainant could not, in a just and equitable sense, obtain full reparation in such an action; but if it was fully adequate, as the act is continuous in its character, the jurisdiction of chancery may well be supported, on the ground that the injury might involve the necessity of a multiplicity of suits.

From what we have said, it follows, that there was no necessity of alleging in the present bill either that the right of the plaintiff had been established at law, or that he had been in possession of the land for three years; and that the action of the court, holding that the bill was defective for the want of one of these allegations, was erroneous.

One of the grounds taken on behalf of the appellee, is, that the water now diverted by Stein was originally taken by one Page, who was the owner of the land where Burden's mill now stands, to supply a mill on another tract of land



owned by him ; and that the conveyance under which Burden claims, being made when the water was so used, must be held to convey only the water in its diminished flow at that time. But we cannot yield our assent to this position. The conveyance is an absolute one, without any reservation ; and as the water is as much the freehold as the soil over which it flows, it must pass by the deed, unless there is some principle upon which it can be excepted. There are, it is true, some easements in which the law implies a reservation in favor of the grantor, although not expressed ; but this is only where the easement is absolutely necessary to the enjoyment of the land retained ; as where one has several distinct parcels of inclosed land, and he sells all but one surrounded by the others, and to which he has no way except over one of the lots he has sold : there the law creates the right of way as an implied restriction incident to the grant, upon the presumption that the grantor could not have meant to deprive himself of all use of his remaining land.—*Packer v. Welsted*, 2 Sid. R. 39 ; *Clarke v. Cogge*, Cro. Jac. 170 ; *Dutton v. Taylor*, 2 Lutw. 1487 ; *Howton v. Fearson*, 8 Term R. 50 ; *Buckby v. Coles*, 5 Taunt. 311 ; note 6 to 1 Saund. R. 323 ; 3 Kent's Com. (5 edit.) 421-22-23. But where there is no such necessity, the doctrine has no application, being founded on that alone ; and in the present case, there is not the least pretence for the claim on the part of the appellant, as he does not claim under Page, or his grantee, Anderson, but independently of them.

It is also insisted on behalf of the appellee, that as the evidence shows that Stein commenced his works some years before Burden filed his bill, it is such laches as should deprive him of the right to the interposition of equity in his behalf. It is certainly true that the court of chancery, in granting injunctions to preserve the property, in cases where the right is not clear until established at law, will refuse the exercise of this power in cases where it is shown that the plaintiff has been guilty of any improper delay in applying to the court—where there has been acquiescence, not in the sense of conferring a right upon another party, but acquiescence in the sense of depriving him of the right to the interference of a court of equity, (*Hilton v. The Earl of Granville*,



Cr. & Ph. 283 ; Dan. Ch. Pr. 1859-60) ; and the case of the Birmingham Canal Co. v. Lloyd, 18 Ves. 515, means, as we understand it, nothing more than this. There can be no possible reason for the application of the principle, where the right of the plaintiff is clear, and the injury of a character which would entitle him to call upon the court to interfere without resorting to law in the first instance. If, indeed, the party has acted in such a manner as would estop him from the assertion of his right—if he has by his conduct induced the other party to alter his situation, under such circumstances as would render it inequitable for him to complain, the case would be different. But the answer sets up no such defence, nor does the evidence found in the record afford any reason to believe that, if set up, it could be sustained.

We consider, then, that the right of the appellant is clear—that by the evidence he has established his right as riparian proprietor to the use of the water in its accustomed flow, by proving that he is the owner of the lands on both sides of the creek, and that Stein has diverted the water in pipes to the city of Mobile ; and this act, although not attended with actual damage, if done in violation of a right, was held by Judge Story, in *Webb v. The Portland Manufacturing Company*, *supra*, to be a sufficient ground to warrant the interference of a court of equity by way of injunction. Here, however, the evidence establishes that the diversion of the water was an actual injury to the appellant. It is true that one of the witnesses, who measured the volume of water in the spring of the year, found it at that time to be sixty times greater than the quantity diverted by the pipes ; and another, who measured it in January, states substantially the same fact. But this testimony is worth very little, if anything. None of the witnesses on the other side, who prove the injury, pretend that, at a high stage of water, there is not enough to supply both the pipes and the mill. They speak of the quantity diverted at low water. The creeks are generally full in January and the spring ; and the stage of water at such times is no criterion whatever as to the quantity of water which flows in the summer and fall. The witnesses for the appellant, upon this point, most of whom have had peculiar opportunities, all agree that, when the creek is low, from one-fourth

to one-third of the water is taken off in the pipes, and that the diversion of this quantity is, at these times, greatly injurious to the mill ; and they agree, also, that with the aid of the works which are in process of erection, double the quantity of water could be taken through the pipes. To be sure, the answer asserts that no greater quantity would in fact be drawn off than is required for the use of the city of Mobile, which the pipes already supply ; but we cannot shut our eyes to the fact, that the consumption might be greatly increased by the reduction of the price, and the growth of the city. But we do not regard this as material. If Stein has no right to take the water, and the diversion of it by him works an injury to another party who is entitled to its use, it is, as we have seen, good ground for the interposition of a court of equity.

But it is insisted in argument for the appellee, that by virtue of his lease from the city of Mobile, and its ratification by the legislature (Acts 1841, p. 53), the act of 1820 (Toulmin's Digest, p. 793), and the other acts in relation to the same subject, he is unqualifiedly entitled to the use of the water for the purpose of supplying the city of Mobile ; and the argument is attempted to be rested on the right of eminent domain. We fully recognize this right in the assumption and appropriation by the sovereign of private property for public uses ; but it can only be exercised on making just compensation to the owner.—Con. Ala. art. I, § 13. We fully admit that the affording to a city or town a supply of water is a public use, within the meaning of the constitution ; but the acts under which the appellee claims do not, and could not, confer upon him the power to deprive other proprietors of the right they have in the water, which is indeed part of their frechold. This we held in *Burden v. Stein*, 24 Ala. Stein can obtain the right to the water by pursuing the course pointed out by the statute (Acts 1841, p. —) ; but until he does this, the rights of the owner are not divested, and he may resort to any legal or equitable remedies which the law affords, to redress the injury, or prevent its continuance.

In relation to the statute of limitations of six years, it is only necessary to observe, that it is no defence in cases of this character. If the suit was at law, for the temporary diver-

sion of the water, it might be different ; but when the application is to a court of equity to interpose its preventive powers against the continuance of an unlawful act, it cannot be set up. The water, as we have said, is a part of the freehold, and a right to it by prescription can only be acquired by the use of it for the same period of time which by the statute bars an entry on lands which, at the time of the filing of the bill, was twenty years.—Clay's Dig. 327, § 83.

The only remaining question is, whether the corporation of the city of Mobile should have been made a party. It may be true that Stein is the lessee of the corporation, but he can have no higher powers under the lease than his lessor. The statutes which have been referred to conferred no right upon the corporation to divert the waters of the Three-mile creek, without making compensation to the riparian proprietors. His acts, as charged by the bill and proved by the testimony, are entirely outside of his lease ; and as to these acts, as he cannot be regarded as lessee of the corporation, it was not necessary that it should be before the court.

Decree reversed, and cause remanded, the appellee paying the costs of this court.

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### GIBSON vs. LAND.

[DETINUE BY HUSBAND, SUING ALONE, FOR A SLAVE IN WHICH HIS WIFE HAD A VESTED REMAINDER, AGAINST PURCHASER FROM DECEASED TENANT FOR LIFE.]

1. *Pleading*—*Descriptive words mere surplusage and cause no variance.*—If the plaintiff in detinue, in his writ and in the commencement of his declaration, describes himself as suing “*as trustee for his wife*”, the superadded words are mere surplusage, or *descriptio personæ* ; and although the endorsement on the writ describes the slave sued for to be the separate property of the wife, while the declaration avers that plaintiff “*was possessed as of his own property*”, there is no variance of which the defendant can take advantage, either by moving to strike the declaration from the file, or by cravingoyer of the writ and endorsement thereon and demurring to the declaration.
2. *Agreement discharging jury, and submitting cause to decision of judge, held equivalent to demurrer to evidence, and waiver of all previous exceptions to admissibility of evidence.*



The bill of exceptions, after setting out all the evidence in the case, together with several exceptions reserved by defendant to the rulings of the court on the admissibility of certain portions of it, proceeded thus—"This being all the evidence, and the value of the slave and the damages for her detention having been agreed upon by the parties, and the jury having been discharged by their consent; and it having been further agreed, that if in the opinion of the court the law upon the foregoing facts was with the plaintiff, a judgment should go in his favor for said negro and damages and costs of suit, as on jury and verdict, and that if the law was with the defendant, judgment should go in her favor"; and then recited the judge's decision in favor of plaintiff, and defendant's exception thereto: *Held*, that the agreement was a waiver of all objections and exceptions previously made and reserved to the admissibility of evidence, and that the court was bound to take the facts which the evidence tended to prove as the admitted facts of the case.

3. *Construction of bequest to testator's wife during her life or widowhood, and if she married, then over to his daughter.*—A bequest was in these words: "I lend unto my beloved wife, during her natural life or widowhood, all my land, also one negro girl called Sarah. \* \* \* Item, my will and desire is, at the death or marriage of my wife, that my son may have my land, to him, his heirs, and assigns forever. Item, I likewise desire, if my wife marries, that my eldest daughter may have the negro girl": *Held*, that the quasi remainder of the daughter was not contingent, but vested—that she took equally on the death or second marriage of her mother.
4. *Executor's assent to legacy, and its effect.*—If a life estate in a slave is bequeathed to one person, with a vested remainder to another, the assent of the executor to the legacy of the particular estate is an assent to the remainder, and renders the interest of the remainder-man, which was previously equitable and inchoate, a complete legal interest.
5. *Husband may maintain detinue in his own name, without joining wife, to recover slave in which she has vested remainder, after termination of life estate.*—If a slave is bequeathed to one person for life, with a vested remainder to an unmarried woman, who subsequently (and after the slave has gone into the possession of the first taker with the executor's assent) marries, her husband may, after the termination of the life estate, maintain detinue in his own name, without joining his wife, against a purchaser from the person having the particular estate; Chilton, C. J., and Goldthwaite, J., resting the decision on the ground, that marriage vests in the husband the absolute interest in all the wife's personal chattels which she has in actual possession, and the right to recover by suit her personal chattels held adversely by others; and Rice, J., holding that the absolute title was vested in the husband.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. JOHN E. MOORE.

DETINUE for a slave named Eve, which the plaintiff claimed under the will of his father-in-law, Nathan Saunders, deceased, who bequeathed the mother of said slave to his wife,



Mary Saunders, during her life or widowhood, with remainder to his daughter Elizabeth, who is now plaintiff's wife ; while the defendant claimed under a purchase from said Mary Saunders, during her lifetime, and while said negro was in her possession with the assent of her husband's executor.

In the writ, and also in the commencement of the declaration; the plaintiff is described as "James Land as trustee for his wife, Elizabeth Land", and in the endorsement on the writ the negro sued for is said to be "the separate property of the within named Elizabeth." The declaration contained two counts, which were as follows:—

"For that whereas the said plaintiff, heretofore" &c., "delivered to the said defendant a certain negro woman slave, named Eve, aged about thirty-five years, and of great value", &c., "to be re-delivered by the said defendant to the said plaintiff, as trustee as aforesaid, when he, the said defendant, should be thereunto afterwards requested ; yet the said defendant, although he was afterwards requested by plaintiff so to do, hath not as yet delivered the said negro woman slave to the said plaintiff, but hath hitherto wholly neglected", &c.

"And whereas the said plaintiff, heretofore" &c., was lawfully possessed of a certain other negro woman slave, named Eve, of great value," &c., "as of his own property, and being so possessed thereof, he, the said plaintiff, afterwards casually lost the said last-mentioned negro out of his possession, and the same afterwards" &c., "came to the possession of the said defendant by finding ; yet the said defendant, well knowing the slave to be the property of said plaintiff, and of right to belong and appertain to him, hath not as yet delivered said negro woman to said plaintiff, although afterwards requested so to do," &c.

The defendant moved to strike the declaration from the files, on account of a variance between it and the writ ; but the court overruled the motion. She then cravedoyer of the writ, with the endorsement thereon, and demurred to the declaration ; and the demurrer was also overruled.

All the evidence is set out in the bill of exceptions ; but, as it is substantially stated in the opinion of Mr. Justice Rice, it is unnecessary to repeat it here. Several exceptions were reserved during the trial to the rulings of the court in the

admission of evidence, and these also are stated in the bill of exceptions ; but the opinion of the court, on the effect of the agreement hereinafter copied, renders further notice of them immaterial. The bill of exceptions then proceeds as follows : " This being all the evidence, and the value of the slave and the damages for her detention having been agreed upon by the parties, and the jury having been discharged by their consent ; and it having been further agreed, that if in the opinion of the court the law upon the foregoing facts was with the plaintiff, a judgment should go in his favor for said negro and damages and costs of suit, as on jury and verdict, and that if the law was with the defendant, a judgment should go in her favor ; and it being the opinion of the court, that on the foregoing facts the law entitled the plaintiff to a judgment, the same was so awarded in favor of the plaintiff ; to which the defendant excepted."

The refusal to strike the declaration from the files, the overruling of the demurrer to the declaration, the rulings of the court on the evidence to which exceptions were saved, and the rendition of judgment for the plaintiff on the agreed facts, are now assigned for error.

D. W. BAINE and WHITE & PARSONS, for appellant :

1. The writ is in the name of James Land as trustee for his wife, and the bond and affidavit show the property sued for to be the separate property of the wife. The words " as trustee," &c., indicate the character in which he sues, and are not merely *descriptio personæ*.—1 Chitty's Pl. pp. 250-51 ; 2 Dev. Law R. 156. The character in which the plaintiff sues is not clearly indicated in the declaration. If the declaration be held to conform to the writ, the court should have rendered judgment for the defendant, as there is no proof tending to show plaintiff's right to recover in his fiduciary capacity ; and if it be held a declaration in the name of James Land individually, then it is fatally variant from the writ, and the court should have struck it from the files. 1 Chitty's Pleadings, *supra* ; 2 Dev. Law R. 156 ; Canning v. Davis, 4 Burr. 2417 ; Chapman, Governor &c., v. Spence, 22 Ala. 588 ; Elliott v. Smith & Co., 1 *ib.* 74 ; Granberry v. Wellborn, 4 *ib.* 120 ; Otis v. Thorn, 18 *ib.* 395. And after

the writ had been set out on oyer, the court should have sustained the demurrer to the declaration.—Teer v. Sanford, 1 Ala. 525; McDonald v. Dodge & McKay, 10 *ib.* 529; 3 Stew. 267; *ib.* 322. There is certainly as great a variance between “James Land as trustee” and James Land individually, as there was between Reuben Chapman as governor and Reuben Chapman individually.

2. The deposition of B. Saunders should have been suppressed.—Colgin v. Redman, 20 Ala. 658.

3. If the plaintiff is entitled to recover at all, the suit should have been brought in the joint names of Land and wife. If Land had died before suit brought, the cause of action would have survived to his wife.—Mason v. McNeill’s Executors, 23 Ala. 216; Johnson v. Wren, 3 Stew. 172; Turner v. Davis, 1 B. Mon. 152; King v. Baldrige, 7 *ib.* 535. If the cause of action would survive to the wife, upon the death of the husband without reducing it into actual possession, then the wife must be joined in an action for its recovery.—Clapp v. Stoughton, 10 Pick. 470; McGruder v. Stewart, 4 How. (Miss.) R. 214; Haile v. Palmer, 5 Misso. 419. The reason of the rule is, that the husband, if he could sue alone, might defeat the wife’s survivorship (which the law favors) before he reduced the property into possession. To sustain the right of James Land to bring this suit in his own name, will be to hold that the mere bringing of suit by the husband alone, for his wife’s choses in action, is a sufficient reduction into possession to defeat the wife’s survivorship.

There are many cases which hold, that the husband, where the cause of action accrues during coverture, may, at his election, either sue alone, or join with his wife; but it is believed that all these are cases in which the husband’s right to the property had become perfected by a constructive possession in him; and no case has been found, in which the husband has been allowed to sue alone, where the wife’s right of survivorship has been recognized. There is no reason for the distinction between causes of action accruing before and after marriage, so far as the joinder of the wife is concerned, except upon the ground that, in most cases of actions accruing after marriage, the wife’s right of survivorship is barred. Haile v. Palmer, *supra*. In many of the cases in which the

husband has been allowed to sue alone, his right has been expressly placed on the ground that the wife's survivorship is barred.—*Armstrong v. Simonton*, 2 Murph. 351; *Spiers v. Alexander*, 1 Hawks, 70. In this State, the husband cannot bar the wife's survivorship by an assignment of her chose in action before he has reduced it into possession (*George v. Goldsby*, 23 Ala. 332); and *a fortiori* he cannot defeat her survivorship by bringing suit in his own name.

The above argument is predicated on the idea, that the cause of action in this case accrued during coverture; but there is no proof in the record showing that the adverse possession commenced since the marriage, and the plaintiff must affirmatively show his right to recover.—*Bott v. McCoy & Johnson*, 20 Ala. 586.

4. Neither the plaintiff nor his wife takes any interest in the slave sued for under the will of Nathan Saunders, deceased. The interest which Mrs. Land took under the will in Sarah (the mother of the slave in controversy) was contingent, because the event on which her right depended (*viz.*, the marriage of Mrs. Saunders) was uncertain and contingent. 4 Kent's Com. 205–6. There being nothing in the will showing an intention different from what the legal interpretation of the terms imports, the case of *Luxford v. Cheek*, Raym. 427, does not apply. The slave sued for, being born before the contingency happened, did not pass to Mrs. Land by the bequest of her mother.

But, even if the bequest of Sarah to Mrs. Land be construed vested and capable of passing Eve, yet the intention of the testator, as gathered from other parts of the will, was to confine the bequest to Sarah alone; and that intention must prevail.—6 Port. 519. The fact that a negro woman is bequeathed, without embracing her increase, when the bequest is not to take effect until a future period, which may be remote, is entitled to some weight as indicating an intention to confine the bequest to her alone. The probability of her having children seems to have afterwards occurred to the testator, and he accordingly provides for that event, by giving two of the children to his other two daughters, and the remainder of his estate is to be divided among his four children. The "remainder" of his estate, as here used, must have



been intended to embrace the increase of Sarah born during his wife's estate, and not bequeathed to his two daughters. There was no other property to which the clause could apply, unless it be held that the testator intended his estate to be kept open for a long period, which has in fact amounted to more than half a century, merely for the division of his household furniture, which, in all probability, did not equal in value the debts charged on it. This construction, too, would nearly equalize the shares of the children; and this is a circumstance to be looked to in arriving at his intention.

JAMES B. MARTIN and J. J. WOODWARD, *contra*:

1. If there was a variance between the writ and declaration, it should have been pleaded in abatement, and could not be reached by motion or demurrer.—Curry & Co. v. Paine, 3 Ala. 154; Palmer v. Lesne, *ib.* 741; Otis v. Thorn, 18 *ib.* 399; Turner v. Brown, 9 *ib.* 866; 9 Port. 195; 24 Ala. 428. The motion to strike the declaration from the files, is only allowed where there is such a total departure as renders the declaration a nullity.—Chapman v. Spence, 22 Ala. 586. The endorsement of the cause of action is no part of the writ, and is not therefore reached by the motion which applied to the writ. It is simply intended to give the defendant notice of the complaint which he is required to answer.—Martin v. Tenison, 13 Ala. 21; *Ex parte* Ryan, 9 *ib.* 90; Wharton v. Franks, 9 Port. 252; Sexton v. Rone, 7 Ala. 829; Summerlin v. Dowdle, 24 *ib.* 428.

2. There was no ground for the suppression of the deposition of B. Saunders.

3. This suit, as shown by the declaration, is in the name of James Land in his own right; and although, in the caption of the declaration, he describes himself as trustee of his wife, yet the character of the suit is determined by the body of the declaration.—Tate v. Shackelford, 24 Ala. 510; Godbold v. Meggison, 16 *ib.* 142; Williams v. Hinkle, 15 *ib.* 719; 8 *ib.* 791; 4 *ib.* 271. To authorize a recovery by the plaintiff, he must show a complete legal title in himself; and whether that title accrued in one way or another, in his own right or that of another, is immaterial to the defendant: the only question is, whether the defendant wrongfully detains the slave from the plaintiff.

4. All the chattels personal of the wife, in her possession (actual or implied) at the time of the marriage, are vested absolutely in the husband ; and for their recovery he may sue in his own name.—1 Chitty's Pleadings, p. 31 ; 3 Term R. 631 ; 1 Barn. & Ald. 218 ; Clancy on Husband and Wife, pp. 1. to 4. The testator's widow took possession of the mother of the slave in controversy under the will, and was so holding at the time said slave was born, and also at the time of the intermarriage of Elizabeth (the remainder-man) with this plaintiff. The possession of the widow, who was the tenant for life, was the possession of the remainder-man. The right to the enjoyment occurred after the marriage—to-wit, in 1847, when the widow married, or in 1851, when she died ; which entitled the husband to sue in his own name. Clancy's H. & W. pp. 2 to 8 ; Pitts v. Curtis, 4 Ala. 350 ; Hopper v. McWhorter, 18 *ib.* 229 ; Price v. Tally's Adm'rs, *ib.* 23 ; Broome v. King, 10 *ib.* 819 ; Mitchell v. Cowsert and Wife, 20 *ib.* 186 ; 1 Murph. 41 ; Spiers v. Alexander, 1 Hawks, 70 ; Woodley v. Findley, 9 Ala. 716. The furthest that the authorities would justify us in going, in a case of this character, would be to say that the husband (as he chooses) may or may not join the wife.—Authorities last cited ; Philleskirk v. Pluckwell, 2 M. & S. 393. The proof shows that the widow held the slave for at least twenty-five years after the plaintiff's marriage, and after (of course) his rights by marriage-accrued ; and it is clear, therefore, that the wife's right, at the time of the marriage, was not a chose in action, but a vested interest with the legal possession.—Authorities *supra*.

5. Admitting that the principle here contended for would enable the husband, by merely bringing suit, to defeat the wife's right of survivorship ; yet this is no argument against his right to maintain the suit in his own name. There is a large class of cases, in which the husband may, at his election, either sue alone, or join his wife ; and in which, if she be joined and her husband die, the action will survive to her, and if not, will go to the husband's legal representative. This is always true where the wife is the meritorious cause of action.—Authorities *supra*.

6. Under the will of Nathan Saunders, plaintiff's wife

(Elizabeth) took a vested, not a contingent remainder. 1 Fearn on Remainders, p. 6; notes; Sheffield v. Orrery; 3 Atk. 283, and authorities there cited. The gift of Sarah was, in legal contemplation, a gift of her increase, except as to those children of which a different disposition is made. Strong's Executor v. Brewer, 17 Ala. 706; Wilks v. Greer, 14 *ib.* 437.

RICE, J.—In Chapman, Governor &c., v. Spence *et al.*, 22 Ala. 588, the writ showed that Reuben Chapman in his individual capacity was the plaintiff in it; but the declaration showed that "the Governor of the State of Alabama" was the plaintiff in it: it was held that such a writ would not support such a declaration, and that the declaration was properly stricken from the file, on a motion duly made to that effect.

The principle recognized in that case is, that a writ sued out in favor of one person will not support a declaration in favor of another person. The principle is sound, but it has no application to the present case; for here, James Land is the plaintiff in the writ and the plaintiff in the declaration. The words "as trustee for his wife, Elizabeth Land," which follow his name in the writ and in the commencement of the declaration, may well be treated as mere surplusage, or *descriptio personæ*.—Arrington v. Hair, 19 Ala. 243; Tate v. Shackelford, 24 *ib.* 510; Aguttar v. Moses, 2 Stark. Rep. 499; 1 Saund. Pl. & Ev. 260; Innerarity v. Kennedy, 2 Stew. R. 156; Biddle v. Wilkins, 1 Peters, 693.

Where the same person is the plaintiff in the writ and in the declaration, neither a variance between the writ and declaration, nor a variance between the endorsement on the writ and the declaration, can be reached by craving oyer of the writ and the endorsement thereon and demurring to the declaration.—Summerlin v. Dowdle, 24 Ala. 428; Curry v. Paine, 3 *ib.* 154; Sexton v. Rone, 7 *ib.* 824.

Each count of the declaration is good, and the counts are properly joined. The plaintiff in the writ is the plaintiff in the declaration; and there is no error in overruling the motion "to strike *the plaintiff's declaration* from the file", nor in overruling the demurrer to the declaration.



A demurrer to evidence is an admission of its competency, and is, therefore, a waiver of all exceptions previously taken to its competency.—Foster v. McDonald, 5 Ala. 376. *A fortiori*, an agreement by the parties in an action of detinue for a slave, entered into after the plaintiff has submitted all his evidence to the jury, that the value of the slave is a certain specified sum, that the damages for the detention amount to a certain specified sum, that the jury be discharged, and “that if, in the opinion of the court, the law upon the foregoing facts was with the plaintiff, a judgment should go in his favor, for said negro, and damages and costs of suit, as on jury and verdict, and that if the law was with the defendant, judgment should go in her favor”,—is a waiver of all objections and exceptions which had been taken in relation to the competency or admissibility of the evidence, prior to the time when said agreement was made. By such an agreement, the court is bound to take the facts which the evidence tended to prove, as the admitted facts of the case; and the only question not waived by such agreement is, whether, upon the facts of the case thus agreed on by the parties, the law is with the plaintiff, or with the defendant.

The material facts thus agreed on in this case, may be thus stated: Nathan Saunders, of South Carolina, made his will in 1793, and died. In 1794, his will was admitted to probate, in that State. Its material provisions are in the following words, to-wit:—

“Item, I lend unto my beloved wife, Mary Saunders, during her natural life or widowhood, all my land, also one negro girl called Sarah, ten head of cattle, four head of horses, also my stock of hogs, household and kitchen furniture, for the support of her and children. Item, my will and desire is, at the death or marriage of my wife, that my son Bartlett may have my land, to him, his heirs. and assigns forever. Item, I likewise desire, if my wife marries, that my eldest daughter may have the negro girl; and if the negro should have children, my desire is, that my second daughter may have her first child, likewise my third and last daughter the said girl’s second child. Likewise, my desire is, after my just debts is paid, and at the decease or marriage of my wife, that all the remaining part of my estate be equally divided between my



four children, or the survivors of them, to them, their heirs, and assigns forever."

Elizabeth was the eldest daughter of the testator. She married the plaintiff (James Land) in 1808 or 1810, in South Carolina, where they then resided, and she is still the wife of the plaintiff. Not long after the death of the testator, all the debts of the estate were paid, and the negro girl Sarah went into the possession of his widow, under the will, and, whilst in her possession, gave birth to several children, among whom was the negro girl Eve, who is sued for in this action, and who is the *fifth* child of Sarah. The girl Eve was born about the year 1815, and continued in the possession of said widow in South Carolina many years. The assent of the executor to the bequest of Sarah, before the plaintiff was married, is sufficiently proved, and is not questioned. The widow married in 1847, and died in 1851, before this suit was commenced. Her last husband died between 1847 and 1851. The appellant, at the commencement of this suit, had possession of Eve (the negro here sued for), and "claimed her under a purchase made from the said Mary Saunders while the negro was in her possession." The value of Eve and of her hire was agreed on by the parties.

The cardinal rule in construing wills requires the court to collect the intention of the testator from the whole will, and to give effect to such intention, if consistent with law, although contrary to the express words of a particular clause; and in searching after this intention, it is just to notice whether or not the instrument, on its face, bears evidence that it was drawn by a person skilled in language and law.—*Saunders v. Saunders*, 20 Ala. 710; *Hamner v. Smith*, 22 *ib.* 433.

"It sometimes happens, that a remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them, or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession."—*Fearne on Remainders*, pp. 241–242; *Bromfield v. Crowder*, 1 Bos. & Pul. New Rep. 313; *Roe v. Briggs*, 16 East's R. 406; *Goodtitle v. Whitby*, 1 Burr. R. 228; *Boraston's case*, 3 Coke, 19; *Massey v. Hudson*, 2 Meriv. R. 130.

In *Fearne on Remainders*, p. 6, note (d), the law which we

think precisely applicable to the will shown in the present case is thus laid down : "A case frequently occurs in practice, where a testator devises 'to his wife for her life, if she shall so long continue his widow ; and in case she marry, to A. in fee':—apparently, in this case, there is ground to contend that A.'s remainder is contingent, as the estate of the wife may end in one of two ways, her death or her marriage, and the remainder to A. is expressed to take effect only on her marriage ; but the courts have determined that it is merely an inaccuracy of expression, and that the intention of the testator is, that A. shall take in either event. They have, therefore, decided that A. shall take equally on the second marriage of the wife, and on her death without being married a second time.—Luxford v. Cheeke, 3 Lev. 125; Raym. 427, and Lady Ann Fry's case, 1 Vent. 199."—Bowling v. Dobyns, 5 Dana's Rep. 442; 1 Cruise's Dig. 188.

The assent of the executor to the particular estate, is an assent to the estate in remainder. The property in the personal chattel being bequeathed in fractional interests in succession, at periods which must arrive, the interests of the first and subsequent taker will vest together.—Toller on Executors, 309; 1 Roper on Legacies, 394; McWilliams v. Ramsay, 23 Ala. 813; Finley v. Hunter, 2 Strob. Eq. Rep. 208.

Before the assent of an executor to a bequest of such a chattel, the interest of the legatee in it is *equitable* and inchoate.—Vanderveer v. Alston, 16 Ala. 494; 2 Williams on Executors, 844–845; Thomas v. White. 3 Litt. R. 180; Woodgard v. Threlkeld, 1 Marsh. R. 10. But the assent of the executor, when given, has relation to the time of the testator's death, and renders the interest of the legatee a complete *legal* interest.—2 Williams on Executors, 844, 849, 850; Toller on Executors, 306; Howell v. Howell, 3 Iredell's Eq. Rep. 522.

In the present case, the estate of the wife, as the only remainder-man, in the slave Sarah (a personal chattel), was, at the time of the marriage, vested, complete, and *legal*. The actual possession was where, according to law, it should have been—that is, with the tenant of the particular estate. Afterwards, and during the continuance of this possession, Sarah gave birth to Eve, and both these slaves continued for several years afterwards with the tenant of the particular es-

tate. If the possession of the tenant of the particular estate ever was adverse to the remainder-man, it certainly did not become so until long after the birth of Eve. The particular estate had determined before this suit was commenced, and the wife of the plaintiff is still living. Upon the facts here shown, my opinion is, that the marriage vested the aforesaid interest of the wife in the husband, and that, as soon as the particular estate determined, he was entitled to the immediate possession, and to maintain detinue to recover the slave Eve.—1 Bright on Hus. & Wife, 34; 2 *ib.* (Appendix), 441; Macqueen on Hus. & Wife, 18, 19 and 46; Magee v. Toland, 8 Porter's R. 36; Pitts v. Curtis, 4 Ala. 350; Broome v. King, 10 *ib.* 819; Machen v. Machen, 15 *ib.* 373; Lenoir v. Rainey, 15 *ib.* 667; McDaniel v. Whitman, 16 *ib.* 343; Whitaker v. Whitaker, 1 Dev. R. 310; Granbury v. Mhoon, 1 *ib.* 456; Pettijohn v. Beasley, 4 *ib.* 512; Miller v. Bingham, 1 Iredell's Eq. R. 423; Daniel v. Daniel, 2 Rich. Eq. R. 118; Ordinary v. Geiger, 1 Brevard's R. 484; Brooks v. Penn, 2 Strob. Eq. Rep. 114; Dade v. Alexander, 1 Wash. R. 30; Banks v. Marksberry, 3 Litt. R. 275; Morrow v. Whiteside, 10 B. Monroe, 412; Wilks v. Greer, 14 Ala. 437; Strong v. Brewer, 17 *ib.* 706; Pollard v. Merrill, 15 *ib.* 174.

Whether, in case the husband should die before he obtains actual possession of the slave sued for, leaving his wife surviving, she would or would not be entitled to the slave, is a question not necessarily calling for a decision in this case; and upon that question I do not consider myself committed by the reasoning or decision in Mason v. McNeill, 23 Ala. 201.

Although there is a difference in the mode of reaching the conclusion, we all agree that there is no error in the record, and that the judgment must be affirmed.

CHILTON, C. J.—I agree in the conclusion attained by my brother Rice, but not in some of his reasons.

When the executor delivered the property to Mary Saunders, the widow of the testator, and the party entitled under the will of Nathan Saunders to a life interest, he assented to the legacy, and divested himself of all property, so that no further assent was required to vest the interest in the party entitled to the *quasi* remainder.

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Marriage vests in the husband the absolute interest in all the wife's personal chattels which she has in actual possession. It vests in the husband the right to recover her personal chattels in specie, by detinue or replevin, held adversely by others; for, having the right to the possession, he has the right to recover the property and reduce it to possession, without joining the wife, although, as in case of bonds and promissory notes, which are assignable, the property might survive to the wife, in the event of the husband's death before he reduced it into possession. It is unnecessary, however, now to decide the question of survivorship, as it does not arise.

GOLDTHWAITE, J.—I concur with the Chief Justice.

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[BILL IN EQUITY BY CREDITOR'S AGAINST DEBTOR'S PERSONAL REPRESENTATIVE—  
EXTINGUISHMENT OF DEBT BY RETAINER—JURISDICTION OF EQUITY WHERE LEGAL REMEDY IS ADEQUATE, SPECIFIC, AND PERFECT.]

1. *Extinguishment of debt by appointment of creditor as debtor's executor*.—How far English doctrine obtains in this State.—In England, if a debtor makes his creditor, or the executor of his creditor, his executor, and the latter accepts the trust, and receives sufficient assets of the debtor's estate, the debt is extinguished; but this doctrine, which results from the power there possessed by the executor over the personal estate of his testator, does not obtain to the same extent in this State, where an executor has no right to take the assets other than money and retain them in satisfaction of his debt; and consequently, in such case, the debt cannot be considered extinguished, unless it is also shown that moneys came to the hands of the executor, which were sufficient for the payment of the demand, and which he might lawfully retain in satisfaction of it.
2. *When retainer, and consequent extinguishment, will be presumed*.—Where it is shown that the debtor, at the time of his death, was seized and possessed of a large estate, consisting of both real and personal property, which went into the hands of his executor, who administered on the estate for nearly twelve years, and at his death left a large portion of the assets unadministered, which afterwards came to the hands of his successor, it will be presumed that the executor did his duty—that he reduced into money assets of suffi-



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cient amount to pay the debts of the estate; and since (if he did not) he ought and could have done so, equity will consider that as done which ought to have been done, and hold the debt extinguished.

3. *Trustee cannot come into equity to collect purely legal demands, when remedy at law is adequate, specific, and perfect.*—A bill in chancery, filed by an administrator, or other trustee, to enforce the collection of a purely legal demand, for which his remedy at law is adequate, specific, and perfect—seeking no discovery, account, recovery of specific choses in action, or particular trust fund—is without equity: the mere fact that the proceeds of the demand, when collected, will be trust property, does not give equity jurisdiction.

APPEAL from the Chancery Court of Tuskaloosa.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Franklin G. Kimball, the appellant, as administrator *de bonis non* of John C. Sims, deceased, against Washington Moody, the appellee, as administrator *de bonis non, cum testamento annexo*, of Edward Sims, deceased. It alleged, in substance, that said John C. Sims departed this life sometime before the first day of January, 1837, intestate, and leaving a considerable real and personal estate; that one Aaron Ready, before the first day of February thereafter, was duly appointed the administrator of his estate, gave bond and qualified as such administrator, and entered upon the duties of his office; that afterwards, on the 6th February of the same year, one Edward Sims, who was the father of said John C. Sims, being indebted to said Ready as such administrator in the sum of \$353 28, executed to said Ready, as such administrator, his promissory note for that amount; that on the 19th May next thereafter, said Ready had in his possession, as part of the assets of his intestate's estate, certain bills of exchange and a promissory note, which are particularly described in the bill, and that on said last-mentioned day said Ready delivered said note and bills of exchange to said Edward Sims, to be collected by him, or to be used by him, and to be accounted for, and took his receipt for the same, which is attached to the bill as an exhibit; that said note and bills of exchange were on punctual and solvent men, and were afterwards paid by the debtors to said Edward Sims, or to those to whom he may have endorsed or transferred them.

The bill further alleges, that said Edward Sims departed

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this life on or about the first day of August, 1840, having first made and published his last will and testament in writing, wherein he appointed said Ready and one Willis Banks as his executors; that said executors, on the 14th August, 1840, proved the said will in the proper court, took out letters testamentary, and entered on the duties of their office as executors of said Edward Sims; that said Ready continued to act as executor of said Edward Sims, and also as administrator of said John C. Sims, until his death, which occurred in January or February, 1852; that said Banks, his co-executor, also departed this life in the summer or fall of the same year; that after the death of said Ready, one Duke W. Goodman was duly appointed administrator *de bonis non* of the estate of said John C. Sims, but he soon afterwards resigned, and complainant was then appointed administrator *de bonis non* of said estate; and that after the death of said Banks, to-wit, on the 16th November, 1852, the defendant was duly appointed administrator *de bonis non, cum testamento annexo*, of said Edward Sims.

It is further alleged, that said Edward Sims, at the time of his death, was seized and possessed of a very large estate, real and personal, a large portion of which remained unadministered at the death of his said executors, and subsequently passed into the hands of their successors in the administration; that said Edward Sims departed this life, as aforesaid, without ever having paid said note, or in any manner accounted for the note and bills of exchange described in his said receipt, thus leaving them valid and subsisting claims against his estate; that said claims were never paid by his said executors, nor was any amount retained by said Ready for that purpose out of the assets of his estate; and that they have never been paid by defendant, but are still valid and subsisting claims against the estate of said Edward Sims, in the hands of defendant as his administrator.

The bill waives an answer on oath, and prays that said claims be decreed valid and subsisting demands against the estate of said Edward Sims; also, for a reference to the master to take an account of the amount due on them, and for general relief.

The chancellor sustained a demurrer to the bill for want of equity, holding that the debt was extinguished; and his decree is now assigned for error.

E. W. PECK, for the appellant :

1. On the question of jurisdiction, the court is referred to the chapter on administration in Story's Equity, vol. 1, commencing with section 530. Ready held the notes and bills of exchange mentioned in the bill, as the administrator of John C. Sims, deceased. He held them, therefore, not as his own, but as trustee. This fact, as is shown by the language of the receipt, and as is stated in the bill, was known to Edward Sims when he received them, and he was consequently bound by the trust ; and he being dead, his estate is accountable for them as trust property.—Story's Equity, vol. 1, § 533 ; Dodson v. Simpson, 2 Rand. 294-99 ; Fisher v. Bassett, 9 Leigh's Rep. 119.

2. The doctrine of extinguishment does not apply to this case. The common-law doctrine of extinguishment is inconsistent with our system of administration. The reason on which the doctrine of the common law is based, is, that if the executor be a creditor of the testator, and as executor receives goods of the estate to the value of his debt, the property in such goods is altered, and becomes vested in the executor—that is, he has them as his own proper goods, in satisfaction of his debt, and not as executor ; so that, in such case, there is a transmutation of property by operation of law. Woodward v. Lord Darcy, 1 Plow. 183, 185 a ; cited in Page v. Patton, 5 Peters, 312. Under our system of administration, there can be no such thing : with us, an executor cannot even take the property of the estate at its appraised value ; much less can he value it himself, and then take it in satisfaction of his debt. There can be no transmutation of the property, except in the mode prescribed by the statute—to-wit, a public sale made under the order of the Probate Court.—Fambro v. Gantt, 12 Ala. 304 ; 2 Greenl. Ev. § 349.

3. But, if it be conceded that the doctrine of extinguishment applies in cases where the debtor makes his creditor his executor, it cannot apply in this case, because Ready was not in fact the creditor of Edward Sims. He held these notes and bills of exchange as the administrator of John C. Sims, deceased—as a mere trustee ; and, as such trustee, deposited them with Edward Sims, who had a full knowledge of the trust, and who therefore became accountable for them himself

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as trustee ; and consequently his administrator *de bonis non* is bound to account for them as trust property, and cannot claim to be discharged by the doctrine of extinguishment.—1 Story's Equity, § 533.

4. The doctrine of extinguishment grows out of the right of retainer—a right intended for the benefit of executors being creditors ; a right that may be postponed, if the estate be not injured in so doing, but was never intended to mislead or entrap executors.—Page v. Patton, 5 Peters, 316 ; 1 Lomax on Ex'rs, 415 ; 3 P.Wms. 184. Besides, in a proper case, the law only presumes that the debt is satisfied, when goods come to the hands of an executor to the amount of his debt ; and being a presumption, it may be rebutted. It is not true that, in this State, where an action is once extinguished, it is gone forever ; for, if an administrator sell property, not in conformity to the statute, although the purchaser gets no title, yet the administrator who made the sale can bring no action, but his successor in the administration may.—Fambro v. Gantt, 12 Ala. 304.

5. It does not follow that the right to retain extinguishes the debt. If the person entitled to the administration be an infant, and administration *durante minoritate* is granted, the administrator may not only retain his own debt, but also for the infant ; but if he does not retain for the infant, the infant's debt will certainly not be extinguished.—2 Williams on Executors, p. 690.

6. The bill in this case does not show that Ready, as executor of Sims, had received goods to the value of these claims ; and the question, therefore, could not be made by demurrer.

7. But Ready, as administrator, held the notes and bills as trustee for the creditors and distributees, and his neglect to retain will not be permitted to operate to the prejudice of his *cestuis que trust*—that is, it will not be allowed to operate as an extinguishment so far as they are concerned.

W. MOODY, *pro se, contra* :

I. As to the jurisdiction of the court on the case made by the bill : The remedy on the note belongs exclusively to a court of law, and no facts or circumstances are stated to give chancery jurisdiction. The complainant insists, however, that



the receipt for the bills of exchange and other note is a matter of trust, and that therefore chancery has concurrent jurisdiction; and this depends on the question, whether a court of law, under the actual circumstances, could give "adequate, specific, and perfect relief."—1 Story's Equity, § 76; Maury's Adm'r v. Mason's Adm'r, 8 Port. 217; 3 Black. Com. 431, 437; Knotts v. Tarver, 8 Ala. 744; McGehee v. Dougherty, 10 *ib.* 864; Lockard v. Lockard, 16 *ib.* 423; 2 Stew. 522; 5 Port. 561; 9 *ib.* 636; Kimbro v. Waller, 21 Ala. 378; 13 Sm. & Mar. 328. No facts or circumstances are stated in the bill, showing, or tending to show, that a court of law could not do all that complainant asks. He claims certain sums of money, alleged to have been had and received for his use, with interest thereon; all alleged to be shown by a writing that ascertains the amount. No discovery is sought, and no account is required to be exhibited; but on the contrary, the bill repudiates these, by waiving an answer under oath.—Hitchcock v. Lukens, 8 Port. 339; Strickland v. Burns, 14 Ala. 514; Cameron v. Clark, Smith & Co., 11 *ib.* 263; Houston v. Frazier, 8 *ib.* 85. The Code (§ 602) definitely settles this question, in accordance with the authorities cited; carrying out the view of Judge Story, that "the concurrent jurisdiction of equity has its true origin in the inability of the courts of law, under the actual circumstances of the case, to give adequate, specific, and perfect relief." By this section, the jurisdiction of chancery is expressly fixed and prescribed.

II. As to the right of retainer, and its effect in destroying the suit.

1. An executor may pay a debt due from his testator to himself, or to another estate which he represents, out of the assets of his testator; and if there be assets sufficient, he is bound to pay it at the risk of losing the debt, for the right to sue (in lieu of which the right to retain was given) is gone forever. That this is the established doctrine of the common law is not denied.—1 Lomax on Executors, pp. 415–18. It has been recognized and acted on by several courts of high authority in this country; and, after a diligent examination of the authorities, I have not found a single conflicting decision.—Muse v. Sawyer, Term Rep. (N. C.) by Taylor, 210; Dozier v. Sanderlin, 1 Dev. & Bat. Law R. 246; Chaffin v.

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Hanes, 4 Dev. Law R. 103; Page v. Patton, 5 Peters, 311; Smith v. Watkins, 8 Humph. 331, which covers the whole ground, Gatewood v. Lyle, 5 Mon. 7; Morris v. Morris, 4 Gratt. 293, cited in the U. S. Ann. Digest, vol. 4, p. 223, § 79; Decker & Tyson v. Miller, 2 Paige's R. 149; Hosack & Blunt v. Rogers, 6 *ib.* 415; Milam v. Ragland, 19 Ala. 85; Knight's Distributees v. Godbold, 7 *ib.* 304; Shortridge v. Easley, 10 *ib.* 520; 3 Johns. Chan. 312. The administrator *de bonis non* stands in the place of the first administrator, is bound wherever the latter would be bound, and concluded by whatever would conclude the latter.—1 Rice's Eq. R. 40; 3 Rand. 287; 6 How. U. S. 60; 7 Ala. 598.

2. There is nothing special in the legislation of this State to set aside the doctrine, except in case of insolvency. The law abolishing the distinction in dignity between bond and simple contract debts cannot have that effect—it only makes the right of retainer more general.—8 Humph. 331, *supra*; 19 Ala. 85; 7 *ib.* 304; 10 *ib.* 520. The objection that an executor, under our laws, cannot take property at its appraised value, nor dispose of it otherwise than by sale, would apply as well to all the other States of this Union, and to England: he must, in either country, pay all the debts with money—by a sale of property, if necessary.

3. That the doctrine of trusts does not apply to moneys collected on bills and notes, though for an executor, is fully shown by the case of Maury's Adm'r v. Mason's Adm'r, 8 Port. 217, where it is said that money has no ear-marks; see, also, Kimbro v. Waller, 21 Ala. 378; 13 Sm. & Mar. 328; 15 Wend. 302. But if it did, how could that affect the right of retainer? If an attorney collects money for an administrator on bills and notes, and then dies, having appointed that administrator his executor; could not the latter retain, if he accepts the appointment, and has assets? How else, since he cannot sue himself, could he get the money? Being the person who is both to pay and to receive, the law gives him, as an equivalent for the right to sue, the right to retain. By accepting the one, he gives up the other, and it is gone forever.

NOTE BY REPORTER.—The briefs of counsel on the statute of limitations, and on several other points presented by the record, are necessarily omitted.

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CHILTON, C. J.—According to the English doctrine, if a debtor makes his creditor, or the executor of his creditor, his executor, this alone is no extinguishment of the debt, though there be the same hand to receive and to pay; yet, if the executor has assets of the debtor, it is an extinguishment, for the reason, that the person to receive is the same person who ought to pay the money.—Woodward v. Lord Darcy, 1 Plow. 185; Fryer v. Gildridge, Hob. 10; Williams on Executors, 943. The extinguishment of the debt is upon the supposition that the creditor has assets which he may lawfully retain to pay himself.—Powell, J., in Waukford v. Waukford, 1 Salk. 303; Williams on Executors, *supra*.

This doctrine would seem very naturally to result from the power which the executor, under the English law, possesses over the personal estate or assets. It is laid down as an elementary rule, which obtains both at law and in equity, that an executor has an absolute power of disposal over the whole personal effects of his testator or intestate; and that they cannot be followed by creditors, or legatees, either general or specific, into the hands of the alienee.—Whale v. Booth, 4 Term R. 625; Nugent v. Gifford, 1 Atk. 463; Williams on Executors, 670. He may pay debts due from his testator, and retain assets of equal value, or dispose of absolutely or mortgage the assets, and such mortgage may be by actual assignment, or by deposit; and although the purchaser, or mortgagee, knew that he was dealing with an executor, he is not bound to see to the application of the purchase money. In the language of Lord Thurlow, in Scott v. Tyler, 2 Dick. 725, "His title is complete by sale and delivery. What becomes of the price is no concern of his."—See Williams on Executors, 671, and cases cited in notes, (ed. of 1841.)

Such being the general powers of an executor over the assets, as recognized by the English law, it might very well be assumed as reasonable and just, that, having sufficient assets and the right to set them apart for his individual use in payment of a debt due to him from the estate, if he failed to do so, he should not be allowed, nor should his personal representative be permitted, to maintain an action for the recovery of the demand. If he failed to pay it by retaining, this was his folly, and he thereby lost his debt, the right of action being extinguished.—Plow. 185.



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But this rule cannot be applied here to the extent to which it obtains in England. So far as the reason on which it is based applies here, it must be recognized ; but our legislation has made a very great change upon the law as it is held in England. The personal representative, with us, is expressly prohibited by statute from taking the goods at their appraised value, or from disposing of them except at public sale. He cannot, therefore, retain the assets, and acquire the absolute right to them, in satisfaction of his demand. He is bound to pay the debts in money, if the estate be solvent ; and if it be insolvent, he has no right of retainer, but the debts are to be paid *pro rata*.

Now the reason why the demand is considered extinguished is, that the personal representative, who is to pay and to receive, has the means of making the payment—that is, when he receives assets which he may thus appropriate to his debt, he ought so to appropriate them ; and the law considers them so appropriated, and the debt consequently extinguished. Let the same rule obtain here, modified according to our law ; as he has no right to take the assets, except it be money, and appropriate the same to the payment of his debt, or retain them, the demand cannot be considered as extinguished, unless it be shown that he had moneys in his hands adequate to the satisfaction of his demand, and which he lawfully might appropriate, or, rather, retain in extinguishment or payment of such demand. If Ready had moneys of the estate of his testator, Ed. Sims, which he ought to have retained, the court should consider that as done which he ought to have done—will consider the demand extinguished by the retainer. But to hold the demand extinguished, because personal goods other than money came to his hands, which our law forbids him to retain, but which it requires should be sold at public outcry so far as may be necessary for the payment of debts, is to make the law inconsistent with itself, which is absurd. Here, there can be no transmutation of the assets, other than money, in the hands of the executor, from his fiduciary to his individual use in satisfaction of his demand. In England it is otherwise. Hence, there is an obvious propriety in holding that the receipt of assets other than money sufficient to pay the debt, works no extinguishment of the demand. The



courts which have ruled otherwise seem to have overlooked this distinction.

2. Let us in the next place briefly consider the equity of the bill, subjecting it to the test we have above laid down.

The bill shows that Ready was the personal representative of the estate of John C. Sims, the creditor, and of Ed. Sims, the debtor, and that consequently he had the right to retain. 2 Wms. Ex'rs, 768, mar. p. (ed. 1841); 1 Rolls' Abr. 922; Hobart, 10; 6 Paige's R. 415-425. It further shows that Edward Sims died in August, 1840, some three years after the indebtedness accrued, and that Ready and one Banks qualified as his executors, and so continued to act until the death of Ready in February, 1852; Banks, the other executor, dying in the summer or fall of the same year. The bill likewise avers, "that the said Edward Sims, at his death, was seized and possessed of a very large estate, real and personal, a large portion of which remained unadministered at the death of the said executors," and which has since gone into the hands of Moody, the appellee, who has been appointed administrator with the will annexed, *de bonis non*, of Edward Sims; that the appellant has been duly appointed administrator *de bonis non* of John C. Sims. It is then averred that Ready did not retain for the indebtedness now sought to be collected, that the executors of Sims did not pay, nor has Moody the administrator paid, any portion thereof.

It thus appears from the face of the bill, that Ready had eleven years and more, within all which he could have paid this demand. It was made his duty by law to have reduced sufficient of the assets of the estate of Edward Sims into money to pay the debts of that estate. The bill shows that the estate was very large, and that after twelve years administration upon it, a large amount of assets remained unadministered, and which have gone into the hands of Moody, the administrator *de bonis non*. As the contrary is not shown by the bill, we must presume the executor did his duty—that he reduced the assets into money of sufficient amount to satisfy the debts. At all events, if he did not do so, he ought and could have done so, and must be considered as having done it. It is fairly inferable from the bill that he could have retained; and under these circumstances, Ready would

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Kimball, adm'r, &c., v. Moody, adm'r, &c.

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have been concluded, and the doctrine of retainer, as it is recognized by all the cases which we have seen, and under the modification we have before mentioned, would apply. It follows, therefore, that the demand must be considered as extinguished.

The bill shows that Ready had assets which he could have applied to the debt, and which it was his duty to have applied in the regular course of administration; and if, having these means and this power, and more than eleven years in which to pay himself, he failed to do so, it is the result of his negligence and mismanagement. We have seen no case which would exempt this from the influence of the doctrine of extinguishment. True, a doctrine in *Page v. Patton*, 5 Peters 311, seems to indicate that this doctrine would not apply, where all debts are placed upon an equal footing; but we are unable to see the reason for this distinction, and the learned judge gives none. It is also intimated in that case, that the doctrine of extinguishment rests on a presumption of retainer which may be rebutted; but this must be considered as applicable alone to the continuation of the right to retain while the same person is to pay and receive, which right is not taken away by appropriating assets to the payment of other demands which might have been retained in satisfaction of the claim due to the administrator.

Upon the whole, while we would not push the doctrine to the extent to which it is carried by the opinion of the chancellor, but must give it a modified application, by requiring it to be shown that the administrator or executor had such assets as he could have applied by an appropriation of them to the extinguishment of the claim due him; yet, when, as in this case, the estate is very large, and more than eleven years elapse, during all which time the administrator has ample power to make the appropriation and satisfy his demand, the law will raise the conclusion that he has done so, and if he has not, it is his fault, which cannot be set up by the administrator *de bonis non* of the estate of the debtor as a ground for a resort to equity.

3. If, however, this view were incorrect, the bill on its face shows an entire want of equity upon another ground. As to the demand due from Edward Sims to John C. Sims, and

which was not collected by Ready, no reason is shown why it might not just as well be recovered at law. The legal remedy is full, adequate, and undisputed. No discovery is sought, and no impediment to a complete legal remedy is averred. As to the claims embraced in the receipt, it is not pretended that any particular fund is in the hands of Moody as administrator of Edward Sims, to which a trust may attach. If the money was collected by Edward Sims, there is no averment that it has been preserved separate from his other money; and having, as it is said, no ear-marks, it cannot be identified or followed. The bill is not filed to obtain the possession of the choses in action upon the ground of a conversion by the administrator in chief, or of a deposit merely with Edward Sims. But it is a bill to recover so much money from the estate of Edward Sims, upon the ground of his indebtedness to the estate of John C. Sims, in consideration of bills placed in his hands to be collected or used by him. It cannot be maintained upon the principle of account, nor is any discovery sought, the answer not even being required on oath. In short, if it can be maintained, then there is no demand created by a sale or transfer of an intestate's property which might not be collected by bill in equity. The bare fact that a purely legal demand is due to a trustee, and that the proceeds will be trust effects, is no ground for resorting to equity to collect it, when the legal remedy is adequate, specific, and perfect.—Code, § 602; 1 Story's Eq. § 76; Maury's Adm'r v. Mason's Adm'r, 8 Port. 217; 8 Ala. 744; 10 *ib.* 864; 16 *ib.* 423; 21 *ib.* 378; 8 Port. 339; 14 Ala. 514; 9 *ib.* 351.

Our conclusion is, that there is no error in the decree of the chancellor prejudicial to the complainant, and the decree is consequently affirmed.

## GOLDSMITH, FORCHEIMER &amp; CO. vs. PICARD.

[ACTION ON THE CASE TO RECOVER DAMAGES FOR THE WRONGFUL AND VEXATIOUS  
SUING OUT OF AN ATTACHMENT.]

1. *Amendment of declaration not revisable on error.*—The amendment of the declaration after issue joined, but before the cause is submitted to the jury, is discretionary with the primary court, and consequently not revisable on error.
2. *Refusal to strike out immaterial averments in declaration works no injury.*—The refusal to strike out immaterial averments, or matters which are stated in the declaration only by way of inducement, is not a reversible error, since the plaintiff could derive no advantage from them, nor could the defendant be thereby prejudiced.
3. *Loss of credit and business as a merchant may be averred.*—One of the natural consequences of suing out an attachment against a merchant, on the ground of fraud, would be to injuriously affect his credit and business; such injuries, therefore, form a legitimate ground of recovery in an action on the case, and may be averred in the declaration.
4. *Depositions will not be suppressed because they were taken before the amended declaration was filed.*—The fact that depositions were taken before the amended declaration was filed, is not a sufficient reason for their suppression, when no specific objection is made to them, and it is not shown that the issue was substantially varied by the amendment.
5. *Admissibility of parol evidence to explain illegible figures in record.*—Where the date of an attachment is illegible, two figures having apparently been written and blended together, the testimony of the clerk who issued the writ is admissible, in connection with it, to show that the wrong date had been first written by the attorney, and that he had corrected it.
6. *Relevancy of evidence tending to show defendant's instrumentality in the levy of the attachment.*—Evidence of the fact that one of the defendants agreed, if another creditor (whose attachment was first in the hands of the sheriff) would yield the preference to their attachment, that he would find property belonging to the plaintiff on which the attachment might be levied, and on which it was subsequently levied, is relevant and admissible for the plaintiff, as tending to show that said defendant was instrumental and active in causing the attachment to be levied; and being admissible for this purpose, its admission by the court for another purpose is not a reversible error.
7. *Admissibility of a prior attachment, sued out by another creditor and levied on the same goods.*—Although the defendants, who are sued as partners, cannot be held responsible for the separate act of one partner in procuring the levy of another attachment in favor of another creditor; yet where the attachment on which the action is founded, by the sheriff's return thereon endorsed, shows that the goods had been first taken under the other attachment, the plaintiff may show that the goods levied on were more than sufficient to satisfy that attachment, and may introduce the attachment and levy for this purpose.



8. *Evidence of plaintiff's general credit and reputation, when admissible—Specific objection to evidence.*—Evidence of the plaintiff's general credit and reputation, *it seems*, is not admissible for him in case to recover damages for the wrongful and vexatious suing out of an attachment, until it has been assailed; but where the record shows that his general reputation was put in issue by the evidence, he may offer evidence to sustain it; and if the defendant wishes to object to the testimony of the witness, on the ground that his evidence shows that he is not qualified to testify to the fact in question, he must make a specific objection to it on that ground.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. McKINSTRY.

ACTION ON THE CASE by Isaac Picard against appellants, to recover damages for the wrongful and vexatious suing out of an attachment against him, on the ground that he had moneys liable to satisfy his debts which he fraudulently withheld. The original declaration contained two counts, the first of which averred the suing out of the attachment, its levy, &c., and then proceeded,—“And plaintiff avers that said writ of attachment was wrongfully and vexatiously sued out against him, and without probable cause, and that thereby, and by reason of the proceedings which were had thereupon, he sustained great damage in his business, and in his reputation as a business man, and in consequence thereof lost much of his custom and profits in business, and his goods were sacrificed and disposed of for much less than their true value,” &c. The second count averred, “that said defendants, maliciously, and without probable cause, and to vex and harass plaintiff,” sued out another attachment against him, which was levied on certain goods in his possession, which were taken by the sheriff and were never returned to him; “whereby plaintiff sustained great injury, not only in the loss of his said goods, but by loss in his business, his profits, his customers, and reputation as a business man,” &c. To this declaration the defendants pleaded, in short by consent, not guilty, with leave to give in evidence any matter in mitigation of damages.

The plaintiff afterwards asked leave to amend his declaration; to which the defendants objected, “on the ground that they have taken the proper issue upon the original declaration filed in said cause, and have prepared their defence with a view to that issue, and are now prepared for the trial of

the same." The defendants declining to withdraw their former plea, the court then ordered that said plea be stricken out, and that plaintiff have leave to amend his declaration ; and an amended declaration was accordingly filed.

The first count of the amended declaration alleges, " that plaintiff was engaged in the mercantile business in the county of Mobile, and had committed no act of fraud whatever, nor contemplated any fraud or fraudulent conduct towards any of his creditors, and was not liable or subject to have any writ of attachment issued against his estate, but was held in great regard, reputation, and credit among his neighbors and all other persons with whom he had dealings ; all which the said defendants well knowing, but falsely, wrongfully, and maliciously intending to aggrieve and oppress plaintiff, and to make him be regarded as insolvent, dishonest, and unworthy of credit, did, on", &c., " wrongfully and vexatiously make, or cause to be made, an affidavit in substance as follows," &c. (here the affidavit is copied :) " and thereupon, then and there, did, wrongfully, vexatiously, and maliciously cause a writ of attachment to be issued," &c. The attachment is then set out at length, and it is averred that said defendants, " wrongfully, vexatiously, and maliciously caused it to be executed by the sheriff," &c.; " by means whereof, to-wit, of the suing out of said attachment and the proceedings thereon had, the said plaintiff lost his credit and reputation as a merchant, with and among his neighbors and acquaintances and all other persons with whom he had business transactions, was greatly wounded and injured in his feelings, lost the use, benefit, and advantage of his aforesaid business, and was forced wholly to abandon it, and has been wholly broken up and injured in his circumstances."

The second count contains, substantially, the same allegations as the first in regard to the plaintiff's credit and standing as a merchant, the making of the affidavit, the issue and levy of the attachment, &c., and then proceeds—" By means whereof, the said plaintiff lost all his credit and reputation among his neighbors and acquaintances and all other persons with whom he had business dealings, and has lost the use, benefit, and advantage of his aforesaid business, and has been wholly broken up and ruined ; and was also subjected to

great injury to his feelings, and to great loss, expense, and litigation by divers other writs of attachment against his estate, which were sued out by divers other creditors in consequence of the premises, to-wit," (setting out the names of the other attaching creditors;) "and did also suffer great loss by the sale at auction of the goods attached for less than their value, and was also subjected to further great loss and expense and costs by divers writs of garnishment issued and executed upon his debtors, whereby debts due to him were attached," &c.

The defendants moved to strike out from the first count of this amended or substituted declaration, "as impertinent, as surplusage, and because they do not constitute causes of damage in this suit, the following allegations, to-wit, the affidavit contained therein; also, all the allegations based upon and referring to said affidavit or cause of complaint; also, the averment of loss of credit and reputation as a merchant with and among his neighbors and acquaintances and all other persons with whom he had business transactions; also, the averment that he was greatly wounded and injured in his feelings; also, the allegation that he lost the use, benefit, and advantage of his aforesaid business; also, the statement that he was forced to abandon his business; also, the statement that he has been wholly broken up and ruined in his circumstances; and also to strike out the whole of the second count of said substituted declaration on the same grounds as above stated." The court overruled this motion, and the defendants then demurred to each count of the declaration, assigning the following grounds of demurrer to each—viz., "1st, that the same is insufficient in law to authorize a recovery against defendants; 2d, that it sets out an affidavit, and relies upon the same as a subject or cause of damage; 3d, that the said affidavit is not shown to have any connection with the attachment complained of, as it is not stated to have been the affidavit made to procure said attachment; 4th, that said affidavit, if it was the affidavit made to procure the attachment complained of, was made in a judicial proceeding, and cannot be made the foundation of an action." An additional ground of demurrer to the second count was stated—to-wit, "that plaintiff therein sets forth, as special damage, facts and



circumstances as the result of the issuance of the attachment complained of, which are not the necessary, natural, or proximate consequence of plaintiff's attachment--viz., 'great loss, expense, and litigation by divers other writs of attachment against his estate, and further great loss, expense, and costs by divers writs of garnishment issued and executed upon debtors of plaintiff's'." The court overruled the demurrer to each count, except as to the last ground of demurrer to the second count, which was sustained.

The defendants then moved to suppress the several depositions on file, on the ground that they were taken under the issue made up at a previous term upon the original declaration, and before the filing of the substituted declaration; but the court overruled their motion, and they then pleaded not guilty.

On the trial, the plaintiff offered in evidence the affidavit and attachment which were the foundation of the action, and which were dated the 25th or 26th September, "the figures 5 and 6 being blended together, and one written over the other"; and then introduced as a witness the clerk of the court, by whom the writ was issued, and who testified, "that the dates of said affidavit and attachment were intended for the 25th September, that the attorney had by mistake written 26th, and that he corrected the error by writing the true date. The defendants objected to said affidavit and attachment going to the jury, alleging that the same varied from the plaintiff's writ and declaration; and they also objected to the testimony of the said clerk, on the ground that it disputed, or tended to dispute, the record of said attachment suit. But the court overruled defendant's first objection, and permitted the said record of the attachment suit to go to the jury, and also overruled defendant's second objection, and permitted the testimony of said clerk to go to the jury; and defendants thereupon excepted."

Plaintiff then introduced as a witness one Webb, who as deputy sheriff had levied the attachment, and who testified, "that before said writ of attachment came to the hands of the sheriff, he went to Morrison (one of the defendants) and stated to him that one Manuel Forcheimer had issued an attachment against the estate of said Picard, and that he (Morrison) had



better place defendant's attachment also in the hands of the sheriff; that said Morrison replied, that said Manuel had not acted rightly towards defendants in having his attachment first levied,—that he (Manuel) had agreed with him (Morrison) that if he (Morrison) would find out goods to be levied on, and point them out to the sheriff, that defendants' attachment should take precedence of his (said Manuel's); that said Manuel admitted to said Morrison, in the presence of witness, that such was the understanding between them, and said that the agreement should be carried out. To the admission of said Webb's testimony as to the reply of said Morrison (the previous part of his testimony not having been objected to) the defendants objected; but the court overruled the objection, and permitted the said reply of Morrison (as detailed by Webb) to go to the jury, and at the same time remarked, in the hearing of the jury, that said testimony might be proper for the consideration of the jury on the question of malice; and thereupon defendants excepted to the allowance of said testimony as evidence in this case. Plaintiff's counsel stated, during the time said Webb was giving the above testimony as to the reply of said Morrison, that the same was offered for the purpose of showing a combination between said Morrison and defendants to vex and harass said Picard."

"Plaintiff's counsel then offered in evidence the writ of attachment, and the sheriff's return thereon, in connection with the aforesaid testimony of said Webb, who further stated, in answer to an interrogatory by plaintiff, that said Morrison pointed out to him the goods which were endorsed as levied on under said attachment of Manuel Forcheimer. Defendants objected to said Manuel's attachment going to the jury, and also to said last-mentioned testimony of said Webb; but the court overruled their objection, and they excepted."

"Plaintiff then introduced as a witness one Dickinson, who testified, that he had known said plaintiff some nine or ten months before said 25th September, 1852, the day on which said attachment was issued; that said plaintiff resided in Athens, Alabama, and did business there as a merchant; that he bought his goods in Mobile; that his reputation as a merchant was good in Mobile; that his (witness') knowledge of said Picard's reputation about that time was derived from

inquiry ; that his inquiries had not been general, but were sufficient to satisfy him that he knew said Picard's general character, and upon the faith of knowledge thus obtained he had sold Picard a part of the very goods levied on by defendants' attachment. The defendants objected to the said testimony of Dickinson as to the reputation of said Picard ; but the court overruled the objection, and permitted the testimony to go to the jury, and defendants excepted. Other witnesses testified, on the part of plaintiff, that the reputation and credit of said Picard were good before defendants' attachment issued ; and it also appeared that said Picard owed mercantile debts, contracted in the course of his business previous to said attachment, which were due and unpaid when defendants' said attachment issued. Other testimony was given to the jury by both plaintiff and defendant ; but, as the same is not material to this bill of exceptions, it is omitted."

Among other matters, the defendants requested the court to charge the jury, that the affidavit itself is to be considered by them as evidence in favor of defendants ; which charge the court refused to give, and the defendants excepted."

The assignments of error are as follows :

"1. The court erred in refusing defendants' motion to strike out particular allegations in both counts of the declaration.

"2. In overruling the several demurrers to the declaration.

"3. In refusing to suppress plaintiff's depositions on motion.

"4. In striking out defendants' plea, and in allowing a new declaration after issue joined and evidence taken.

"5. In admitting as evidence, under the pleadings, the affidavit and attachment issued by defendants.

"6. In allowing parol evidence to vary and contradict the record of said attachment and affidavit.

"7. In allowing the witness Webb to relate the conversation between defendant and M. Forcheimer.

"8. In allowing the attachment of M. Forcheimer, its levy, &c., to go to the jury.

"9. In allowing the testimony of Dickinson, as to the reputation of plaintiff, to go to the jury.

"10. In refusing the charge asked by defendants."

JNO. T. TAYLOR, for the appellants.

A. R. MANNING, with whom was WM. M. BROOKS, *contra*.

GOLDTHWAITE, J.—In the case of the Planters and Merchants' Bank v. Willis & Co., 5 Ala. 770, it was held by this court, that the amendment of the pleadings, at any time before the case was submitted to the jury, was a matter purely within the discretion of the court, and for that reason was not revisable here. This disposes of the question presented by the fourth assignment of error.

The affidavit on which the attachment was founded, and the allegations in relation to the making of the same, are set out in the declaration only by way of inducement—not as a statement of the injury, but simply as a statement of the circumstances under which the injury was committed (1 Ch. Pl. 326) : and although it might have been omitted, and the declaration still have been good, no prejudice could result to the defendants from not striking it out. So, also, as to the allegation of injury to the feelings : whether this is one of the consequences resulting from the suing out of the attachment, which the jury could legitimately take into consideration, it is not necessary now to decide ; for, if they could not, still no prejudice could result to the defendants from the insertion of it, as the plaintiff could derive no right to recover for consequences which could not legally enter into the damages, although they were stated in the declaration.

In relation to the averments as to the loss of credit and business : we think they were proper, as one of the natural consequences of suing out an attachment against a merchant, on the ground of fraud, would be to affect his credit and business injuriously (Donnell v. Jones, 13 Ala. 490) ; and as injuries of this character might legitimately be considered by the jury, they were not improperly inserted in the declaration. There was no error prejudicial to the defendants, in overruling the motion made to strike out of the first count the allegations to which we have referred.

What we have said in relation to the action of the court below on the motion to strike out, applies to the demurrer to the first count. The affidavit was not of the *gist* of the action ; it might be entirely struck out, and a good cause of action remain upon that count.

Neither was there any error in refusing to suppress the depositions which had been taken before the filing of the amended declaration. If the issue was substantially varied—if the testimony required to sustain the last issue was different from that which was necessary to sustain the first, or if any portion of the deposition was inapplicable, under the changed state of the pleadings, by bringing it to the notice of the court, the rights of the defendants could have been guarded. But this was not done—no specific objection was made to the depositions, and no ground or reason assigned for their suppression, except that they were taken before the amended declaration was filed. If, as we have said, the issue was substantially the same, there was no reason for the parties incurring the trouble, expense, and delay consequent upon a re-taking; and if not, the party should have shown that they were inapplicable to the issue as then made up.

It appears from the record, that on the trial the plaintiff offered in evidence an affidavit and writ of attachment, which corresponded in all respects with the affidavit and attachment described in the declaration, except that it was uncertain whether the day of the month on which they bore date was the 25th or the 26th, the figures 5 and 6 having both apparently been written and blended together. In connection with this testimony, the plaintiff offered the clerk of the court who issued the attachment, who testified, that the figures were intended for 25,—that the attorney had by mistake written 26, and that he corrected the error by writing the true date. This evidence, in connection with the affidavit and attachment, was permitted to go to the jury, and the action of the court in this respect is assigned for error. Upon general principles, we should entertain no doubt, where a writing of any sort is obscure from the manner in which it is written, that parol evidence would be admissible to decipher it. But there is no want of authority directly to the point. The question was decided, more than a century since, by Sir Joseph Jekyll, Master of the Rolls, in *Masters v. Masters*, 1 Pr. Wms. 422. There the legacies in a will being written “blindly and hardly legible”, it was referred to a master to examine and report what those legacies were, “the master to be assisted with such as understood the art of writing.” So,



in *Norman v. Morrell*, 4 Ves. 769, where a legacy was written in figures, and the question was whether it was £300 or £800, it being insisted that the first figure was originally 3, but had been altered to an 8 by drawing the pen over it, and extending the lower and upper parts of the figure towards the centre; an issue was directed to ascertain the fact. *Goblet v. Beechly*, 3 Sim. 24; is to the same point, and also *Reman v. Hayward*, 2 Ad. & El. 666, and *Armstrong v. Burrows*, 6 Watts.

In relation to the conversation which occurred between the witness Webb and the defendant Morrison, it is to be observed, that the issue was, whether the defendants wrongfully and maliciously sued out the attachment, and caused it to be levied on the property of the appellee; and that under this issue, any evidence which tended to establish the fact that either of the appellants procured the attachment to be issued, or levied, would be relevant. The admission made by one of them is, in effect, that he had agreed to find the property of the plaintiff to be levied on, if a third person, whose attachment was first in the sheriff's hands, would yield the preference to the attachment for the suing out which the suit was brought, and which was subsequently levied on the property pointed out by Morrison. This, at least, tended to show that he was instrumental and active in procuring the attachment in favor of himself and the other appellants to be levied, and was directly involved in the issue; and as it was admissible for that purpose, it was not error that it was received by the court for another, as the other party could have limited its effect by asking the necessary instructions.—*Cook & Scott v. Parham*, 24 Ala. 21.

As to the admission of the attachment and levy in favor of Manuel Forcheimer, it may be conceded that the defendants could not be held responsible in the present action for the part taken by one of them in causing that attachment to be levied. But the record shows that the attachment in favor of the appellants had been offered, and that from its return it appeared that the goods levied on had first been taken upon the other attachment, which therefore had the prior lien. Upon this state of facts, the appellants might have urged, in mitigation of damages, that the goods taken by their attach-

ment had been first taken upon another in favor of a different party ; and to rebut any inference prejudicial to them arising from this circumstance, it would have been proper for the appellee to show that the property thus taken was more than sufficient to satisfy the attachment first levied ; and the initiatory step would have been the introduction of it and the levy.—Cuthbert v. Newell, 7 Ala. 457.

In relation to the action of the court in admitting the testimony of the witness Dickinson : we incline to the opinion, that in actions like the present, proof as to the general credit or reputation of the plaintiff would not be admissible, until it was assailed.—Rodrigues v. Tadmere, 2 Esp. N. P. C. 720 ; 2 Ph. Ev. 258. But in the present case, the record shows that the credit and reputation of the plaintiff was put in issue by the evidence. As, therefore, it was competent for the witness to speak as to his reputation, and his testimony was directed to that point, it was not error for the court to overrule a general objection. Evidence as to character was admissible, and if it was supposed that the witness had shown from his examination that he was not qualified to give evidence as to the fact in question, the mind of the court should have been directed to it by a specific objection on that ground. The court is not bound to hunt for the particular ground on which a general objection may be sustained under such circumstances.—Wallis v. Rhea, 10 Ala. 451 ; Milton v. Rowland, 11 *ib.* 732 ; Donnell v. Jones, 13 *ib.* 490.

Our conclusion, upon the whole record, is, that the judgment must be affirmed.

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### JORDAN *vs.* OWEN.

[PRACTICE PRESCRIBED WHEN PLAINTIFF SEEKS TO ESTABLISH THE CORRECTNESS OF HIS DEMAND BY HIS OWN OATH ; AMOUNT IN CONTROVERSY BEING LESS THAN \$300.]

1. *Plaintiff must swear to fact of non-payment.*—If the plaintiff seeks (under section 2313 of the Code) to establish “the correctness of his demand” by his

own oath, he cannot be permitted so to shape the facts to which he swears, as to deprive the defendant of the right to prove by his oath that the demand has been paid : he must, therefore, not only state facts which, if proved by other witnesses, would make out a *prima facie* case of indebtedness on the part of the defendant to him, but he must also swear to the fact of non-payment; and if he fails to do this, it is not erroneous to exclude from the jury all that he states.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. THOMAS A. WALKER.

THIS action (William R. Jordan v. William F. Owen) was commenced in September, 1854, and was founded on an open account for goods, merchandise, and chattels sold by plaintiff to defendant, and money paid for him and at his request; the total amount claimed being \$165. The defendant pleaded, in short by consent, payment, set-off, and the statute of limitations, with leave to give in evidence any matter which might be specially pleaded.

On the trial, as the bill of exceptions states; "the plaintiff's counsel proposed to prove by the plaintiff himself, on oath, that he had sold and delivered various articles to the defendant, comprising the account sued on, and the price of the same; having first showed that he had given more than five days' notice to the defendant of his intention to establish the demand sued on by his own oath. The court, by the consent of both parties, allowed the plaintiff to be first sworn as to the truth of the facts which he proposed to prove, before any denial of the same on oath was made by the defendant. The plaintiff then swore, that he sold and delivered to the defendant, in 1852, one cow and calf for \$15,00, another cow and calf for \$18,00, a third cow and calf for \$20,00, one yoke of oxen for \$40,00, twenty pounds of pork for \$1,20, and six hundred and fifty ears of corn for \$3,25; that he also sold and delivered to the defendant, in 1853, one plow-rod worth 35 cents, one pound of bluestone worth 25 cents, one pair of shoes worth \$1,60, two bushels of rye worth \$1,50, and ninety-one pounds of beef at \$2,57; and that in 1854, he paid John Jones, as surety for said defendant, \$73,44, debt, interest, and costs. Plaintiff's counsel then closed his examination of plaintiff, and defendant cross-examined him as to several of said items. The defendant was then introduced, and, after

being sworn, was asked, whether he denied upon oath the truth of the facts stated by the plaintiff; to which he answered, that a portion of the plaintiff's statement was true, and a portion untrue. He was then asked, what portion was true, and what untrue; and answered, that the cow and calf charged at \$20,00 in 1852 was never sold and delivered by plaintiff to him, that the pork was only \$1,00, instead of \$1,20, that the corn charged at \$3,25 was sold at \$1,95, that the plow-rod and bluestone mentioned by plaintiff were never sold and delivered to him, and that the balance of plaintiff's statement was true. The defendant's counsel then asked him this question, 'Is it true that you were indebted to the plaintiff at the commencement of this suit, for any of the articles sworn to by him?' The plaintiff objected to this question, because it was illegal and tended to elicit illegal evidence; but the court overruled the objection, and allowed the question; and to this the plaintiff excepted. The defendant answered, that he denied that he owed the plaintiff anything; to which answer the plaintiff excepted, and moved the court to exclude it, but the court refused to do so, and the plaintiff excepted. The court then, upon this state of facts alone, and against the plaintiff's objection, excluded from the jury all the statements of both plaintiff and defendant; and thereupon, to the exclusion of said plaintiff's statements, plaintiff excepted."

These rulings of the court are now assigned for error.

D. W. BAINE, for the appellant, contended, that the defendant should have been confined to a denial of the facts sworn to by the plaintiff.—*Bennett v. Armstead*, 3 Ala. 325; *Yarborough v. Hood*, 13 *ib.* 176; *Ivey v. Pierce*, 5 *ib.* 374; *Hayden v. Boyd*, 8 *ib.* 323. The truth of the defendant's testimony is only reconcilable with the idea that the account, once due, had been discharged by payment or set-off; and he could not show such a discharge by his own oath.—*Bennett v. Armstead*, *supra*.

JAMES B. MARTIN, *contra*, insisted, that the substance and effect of the facts to which the plaintiff swore, was, that the defendant owed him a certain amount at the commencement



of the suit; and that therefore the defendant might deny that fact in express terms.

RICE, J.—Section 2313 of the Code declares, that “in all suits upon contracts, where the defendant has been personally served with process, where the matter in controversy does not exceed three hundred dollars, the plaintiff is competent to establish *the correctness of the demand* by his own oath, if the defendant is a resident of the State, unless he in open court *denies, upon oath, the truth of the facts proposed to be sworn to by the plaintiff.*”

Section 2314 prescribes the manner in which notice must be given of the plaintiff's intention to establish his demand by his own oath.

It is evident that, under section 2313, the defendant is *confined* to a denial, upon oath, of “the truth of *the facts proposed to be sworn to by the plaintiff.*” It must be taken for granted that the legislature did not intend, by this section, to give the plaintiff an unjust advantage over the defendant; and we must so construe it as to prevent such a result, if the words employed in it will justify such construction.

We think it clear, that the plaintiff cannot be permitted, under this section, so to shape the facts which he proposes to prove by his own oath, as to deprive the defendant of the right to prove by his oath that the demand has been *paid*. In cases falling within this section, “*the correctness of the demand*” must be regarded as not proved by the plaintiff's oath, unless he swears that it has not been paid. He knows whether it has been paid or not. In this respect, he is not like other witnesses. When he undertakes to prove by his own oath *the correctness* of his demand, he must not only state facts, which, if proved by other witnesses, would make out a *prima facie* case of indebtedness of the defendant to him, but he must go further, and swear to the fact of non-payment of the indebtedness.

If we do not require him to go to this extent, he would have it in his power, by proving by his own oath special facts which make out a *prima facie* case of indebtedness, to deprive the defendant of the right to prove by his oath a payment of such indebtedness; for the defendant is *confined to a denial*

of the facts proposed to be sworn to by the plaintiff. We cannot put a construction on the section, which might enable a plaintiff to obtain any such advantage over the defendant. It is no hardship to require the plaintiff to swear that the demand has not been paid, and to declare the rule to be, that where he fails to swear this, he does not "establish the correctness of his demand" by his oath; and that in such case it is not erroneous to exclude all he may state from the jury. *Hiscox v. Hendree*, at the present term.

Where the plaintiff's proposition to prove by his oath the correctness of his demand, is in accordance with sections 2313 and 2314, if the defendant swears that he has paid the demand, or controverts all the facts proposed to be sworn to by the plaintiff, the court should exclude from the jury all that is stated by either of them.—*Logan v. Hodges*, 7 Ala. 66; *Hudgins v. Nix*, 10 *ib.* 575. But if the defendant denies, upon his oath, only part of the facts sworn to by the plaintiff, and does not swear that he has paid the demand, then the facts sworn to by the plaintiff which *are not denied* by the defendant, may be introduced by the plaintiff as evidence to the jury.—*Palmer v. Severance*, 9 Ala. 851; *Yarborough v. Hood*, 13 *ib.* 176.

The court below may have excluded the plaintiff's statement from the jury for a wrong reason; but as there is a good reason for its exclusion—to-wit, the failure of the plaintiff to swear that the demand had not been paid—we are bound to affirm the judgment.

## DE VENDELL vs. DOE EX DEM. HAMILTON.

[EJECTMENT BY PURCHASER AT SHERIFF'S SALE UNDER EXECUTION AT LAW AGAINST GRANTEE OF DEFENDANT IN EXECUTION.]

1. *Construction of statute requiring registration of deeds of trust.*—Deeds of trust conveying real property are placed by the statute (Clay's Digest, p. 255, § 5) on the same footing with deeds of personalty, except as to the time allowed for registration, and the same rules of construction are applicable to both.

*De Vendell v. Doe ex dem. Hamilton.*

Under the construction heretofore adopted as to deeds of personalty, if a lien attaches in favor of a judgment creditor before notice of a deed not duly recorded, the purchaser is protected, although he may have had notice of the deed at the time of his purchase; and this construction is hereby extended to deeds conveying real estate.

- 2—3. *Title of purchaser at sheriff's sale.*—If a deed of trust is void as against a judgment creditor for want of due registration, it cannot operate to place the title beyond the lien of his judgment; the purchaser at sheriff's sale receives the same protection, and acquires the legal title to the land.
4. *Decision on question of fact not revisable on error.*—When a cause is submitted to the decision of the judge, without the intervention of a jury, on an agreed statement of facts, with leave to either party to appeal from his judgment, his decision on a question of fact is not revisable on error.
5. *Lien of judgment not lost by laches.*—The lien of a judgment which has not become dormant is not lost or impaired by laches in issuing execution.
- 6—7. *Construction of acts for liquidation of Planters and Merchants' Bank of Mobile.*—A judgment obtained in the name of the Planters and Merchants' Bank of Mobile before the surrender of its charter, and afterwards sold by its trustees under the act of 1850, is not rendered dormant by the operation of the several acts for the liquidation of the Bank, nor is the purchaser required to revive it by *scire facias*.
8. *Proof of demand on which judgment was rendered not required of purchaser.*—A purchaser at sheriff's sale, who brings ejectment against the grantee of the defendant in execution, is not required to prove the demand on which the judgment under which he purchased was founded, but may recover on proof of the judgment, execution, and sheriff's deed.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. CHARLES W. RAPIER.

EJECTMENT by Thomas A. Hamilton against Emilius De Vendell, to recover a certain lot in the city of Mobile. The case was submitted to the court, without the intervention of a jury, on the following agreed statement of facts:

"On the 5th day of June, 1840, A. Batre held the legal title to, and was in possession of, the property in controversy, and on that day a deed, embracing the same, was executed, acknowledged and delivered to Paul Chaudron; but said instrument, a copy of which is hereto annexed, marked 'A', was not recorded until the 19th day of December, 1840. There is no evidence of any notice to the plaintiff, or to the judgment creditors hereinafter mentioned, of the existence of said deed when the judgment under which plaintiff holds was rendered; nor was there any evidence of a change of possession up to that time.

“ On the 14th day of December, 1841, the Planters and Merchants' Bank of Mobile obtained several judgments against said A. Batre and Paul Chaudron, under the style of A. Batre & Co., upon which executions regularly issued within a year and a day. On the — day of —, 1850, Moses Waring purchased said judgments, at a sale of the assets of said Bank, made in pursuance of law, and the same were assigned to him by the trustees of the Bank. There is no evidence that Waring, at this time, had any actual knowledge or notice of any claim made by defendant to the property in controversy. Some years before the purchase of said judgments, said A. Batre had left the United States, and lived in Paris; and the property was in the possession, control, and management of De Vendell, the defendant, from the time said Batre left for France. On the 2d day of April, 1852, within ten years of the issuing of the last executions on said judgments, *alias fi. fas.* were issued, and levied on said lands, and they were sold by the sheriff of Mobile county; and the plaintiff became the purchaser, and now holds the sheriff's deed, dated June 7, 1852. At the time of the purchase of said lands by the plaintiff, he had full knowledge of the defendant's claims, and of the alleged title under which he claims.

“ On the 1st day of May, 1843, said Batre made another deed of said lands to James West, Jr., which was regularly recorded as the law directs, and a copy of which is hereto attached, marked ‘C’; and it is admitted that the defendant has been substituted in place of said West, as trustee in said deed, by decree of the Chancery Court, before the institution of this suit. On the 9th of April, 1850, said Paul Chaudron executed to defendant an instrument in writing, a copy of which is hereto attached, marked ‘D.’

“ It is further admitted that all the acts of the legislature of Alabama, concerning the said Planters and Merchants' Bank, are in evidence, and that her effects, at the time of the purchase of said judgments, were in the hands of Sidney Smith and D. Stodder, as trustees appointed under said acts to wind up her affairs, and who transferred said judgments regularly to said Waring. It is admitted, also, that said A. Batre and Paul Chaudron were in partnership on the 5th day of June, 1840, under the name of A. Batre & Co., and before



that time ; and that on the 30th day of May, 1840, said Batre executed and delivered to said Chaudron a power of attorney, which was recorded in the office of the clerk of the County Court of Mobile on the 24th October, 1840, and a copy of which is hereto annexed, marked 'E.'

"The court is to draw any inferences from the above facts which a jury might legitimately draw ; and if of opinion that, upon this state of facts, the plaintiff should recover, then judgment to be entered accordingly ; if otherwise, then judgment for defendant. Plaintiff does not insist upon mesne profits. Each party reserves the right to carry the case to a higher court for revision. It is agreed, also, that the creditors named in the deed of 1843 (except the Planters and Merchants' Bank, who refused it) assented soon after to said deed."

Exhibit A, above referred to, is a copy of the deed of trust from Batre to Chaudron, dated June 5, 1840, conveying the land in controversy, with other property, to secure the payment of certain specified debts ; and it is therein stipulated, that said property is to be disposed of as might be agreed upon between the trustee and the secured creditors, and that the proceeds of sale were to be disposed of in the same way. Exhibit C is the deed of trust of 1843, conveying the same property to West in trust for the payment of debts. Exhibit D is a deed from Chaudron to defendant, dated April 9, 1850, reciting therein Bate's deed to Chaudron,—that most of the creditors named in the said deed had been satisfied and paid ; that those who had not been paid had never signified their assent to the trust ; that said Batre had since made a general assignment to West, for the benefit of all his creditors, including those secured in the first deed, and had requested him (Chaudron) to relinquish his trust to the general assignee ; and that De Vendell had been appointed by the Chancery Court trustee to execute the said assignment in place of West, who had died ;—in consideration of all which, he (Chaudron) executed this deed, in trust, &c. Exhibit E is Batre's power of attorney, authorizing Chaudron to transact all his business during his absence from Mobile, to sell his lands, to make deeds in his name, and to substitute attorneys in that behalf.

Upon these facts, the court rendered judgment for the plaintiff below, and its judgment is now assigned for error.

JOHN T. TAYLOR, for the appellant:

1. There is no pretence that the deed from Batre to Chaudron was founded in fraud, and the evidence shows that it was executed and delivered: not only before the rendition of the judgment under which plaintiff bought, but long before the creation of the debt on which it was founded. The legal title, therefore, had passed out of Batre before the judgment was rendered; and for this reason no lien attached, as a judgment is a lien only on the legal estate.—1 Cushm. (Miss.) 298; 8 Geo. 208; 21 Ala. 262; 17 *ib.* 751. Therefore, if plaintiff bought any right at the sheriff's sale, it dates only from the deed to him; and before this De Vendell had obtained possession, and was then holding under two deeds—one from Batre to Chaudron, and the other from Batre to West.

2. The deed from Batre to Chaudron, as against plaintiff, is good. A purchaser at sheriff's sale takes only the interest of the defendant in execution, and is bound to the same extent with him.—21 Ala. 262. There was no proof of the *bona fides* of plaintiff's judgment.—16 Ala. 725.

3. It is clearly inferable from the conduct of the Bank that it had actual notice of the deed to Chaudron. Owning the execution for nearly twelve years, it never offered to make the lands liable, and finally sold the judgment for little or nothing. The lands were situated in Mobile, where also the Bank was located; and the deed was recorded in the proper office long before its debt was created. Possession under the deed for several years back was shown; and there being no evidence of the time of the change of possession, and the deed being absolute, the law implies that possession commenced with the date of the deed; and this, of itself, would be notice. But if the possession remained in Batre, the inference is irresistible, that the Bank and its officers knew it was not his; in no other way can the refusal to levy on it be explained.

4. The delay of the Bank amounts to gross negligence, and it will be held to have waived its lien, if it ever had any; and Batre's creditors having accepted the trust, the deed of 1843 to West would also be held good against it, and the

purchaser of the judgment would only take its position. It has been repeatedly held that the stay of an execution in the hands of the sheriff, though without consideration, is a fraud on junior creditors; what is the difference between staying an execution in the hands of the sheriff, and refusing to issue one at all for nearly ten years?—2 Comst. 451.

5. The legislature declared the Bank's charter forfeited, and seized its franchises; the Bank acquiesced, and trustees were appointed under the acts of the legislature. The Bank, therefore, had surrendered its charter, which was the civil death of the corporation; and even if the subsequent acts continue the obligations against its debtors in favor of the trustees, still they could not sue, under a judgment obtained in the lifetime of the corporation, until it was revived by *scire facias*, any more than an executor or administrator could sue on a judgment obtained by his testator or intestate.—Bingham on Judgments and Executions, p. 141; Foster on Scire Facias, tit. Joint Stock Companies; 6 Sm. & Mar. 513; 12 *ib.* 700.

6. But, if it should be held that the acts gave this power to the trustees, still it is clear that no one but the trustees has it. There exists no authority in any one outside of the acts, and the acts gave the power of using the name of the Bank only to the trustees, and only to them for the purpose of winding up its affairs. Admitting, then, that the sale of the Bank's assets impliedly gave the purchaser the right to sue and collect the debts, this by no means gives the right to use the name of the Bank. Waring, therefore, having no power to use the name of the Bank, should have sued on the judgment, or revived it by *scire facias*; and, until revived in some way, the proceedings under it were void.—Pamphlet Acts 1843, p. 70; *ib.* 1844, p. 78; *ib.* 1845, p. 46; *ib.* 1850, p. 126; 17 Ala. 754. If it was necessary to have revived the judgment before execution could issue, the lien of the judgment was lost; the lien only lasts while the right to issue an execution or *elegit* continues.—3 Ala. 560; 16 *ib.* 284; 15 *ib.* 225.

P. HAMILTON, *contra*, made the following points:—

1. The statute explicitly declares, that deeds of trust of land to secure debts must be recorded within sixty days, else



they are void as against judgment creditors and purchasers without notice.—Clay's Digest, p. 255, § 5. Under this statute, in the case of personal property, it has been held, that a deed of trust is void against a subsequent judgment creditor, unless recorded within the limited time.—Wallis v. Rhea & Ross, 12 Ala. 646; Bradford v. Dawson & Campbell, 2 *ib.* 203; Cummings & Cooper v. McCullough, 5 *ib.* 324; Ohio Life Ins. Co. v. Ledyard, 8 *ib.* 866; Chamberlain v. Adams, MS. opinion by C. J. Dargan.

2. The effect of the unrecorded deed, as against the judgment creditor, is declared to be nothing: the conveyance is inoperative, and the creditor sells the title of his debtor irrespective of it.—Daniel v. Sorrells, 9 Ala. 447. The judgment overrides the claim of the defendant in this case, and whatever the judgment bound in favor of the creditor passes to the purchaser under the sheriff's deed.

3. None of the creditors named in the deed of 1840 are proved to have assented to the deed. Without such assent, the deed is revocable by the grantor; and the levy of an execution works its revocation.—Elmes v. Sutherland, 7 Ala. The *bona fides* of the transaction is not proved, nor is any consideration shown.—Doe v. Reeves, 10 Ala. 137.

4. The purchaser, holding under a judgment creditor, is not required to prove anything beyond the judgment, execution, and sheriff's deed. If fraud is asserted, the judgment should be in some way impeached; but till then, from the necessity of the case, and from the propriety of giving credence to legal proceedings, the production of the judgment, execution and deed is sufficient.—Sellers & Cook v. Hayes, 17 Ala. 749; Costillo & Kcho v. Thompson, 9 *ib.* 947; Ohio Life Ins. Co. v. Ledyard, 8 *ib.* 866; 5 *ib.* 58, 316; 9 *ib.* 440; Burt v. Cassety, 12 *ib.* 739; Barron v. Tart, 18 *ib.* 668; Dubose v. Young & McDowell, 14 *ib.* 139; 7 Dana's R. 511; 6 Munf. 366.

5. If the execution under which plaintiff purchased is voidable, by reason of the proceedings against the P. & M. Bank, the defendant should have taken other means to set it aside. If the execution is void, it does not arise from the lapse of time, for ten years had not elapsed from the issue of former executions. If void, it must result from the several statutes for the settlement of the Bank. Nothing appears on this record



of any judgment of forfeiture, or its reversal. The cases cited from Mississippi depend on statutes of that State, and have no application here; and, besides, the facts are different. Here, the Bank's charter has never been entirely vacated, but the existence of the corporation was continued, though with limited powers. The suit was pending before the modification of the charter, and the jurisdiction of the court had attached. There was no need of a *sci. fa.* to revive the judgment, and the statute required none; no presumption of payment had arisen from lapse of time, and no change of interest had occurred. The object of the several statutes was, to prevent the course now demanded, and to ensure a speedy collection of the debts.—Saltmarsh v. P. & M. Bank, 14 Ala. 668.

6. The act of 1850 directed a sale of the Bank's assets, and Waring became the purchaser of the judgment, and took it with all the incidents of a judgment. The policy of the law was, not to depreciate the value of the assets, but to make them produce as much as possible; and the court will give such a construction to it as will effectuate that intention. The courts recognize the assignment of judgments, and extend their protection to the assignee; and it was never heard that a *scire facias* was necessary to perfect the title of an assignee.

7. But the judgment and execution are regular, and cannot be thus collaterally impeached.—Weir v. Clayton, 19 Ala. 132; Pollard v. Cocke, *ib.* 188; Barron v. Tart, 18 *ib.* 668.

8. The lapse of time since the judgment does not impair its validity: having obtained his judgment, the creditor may rest on it.—Turner v. Lawrence, 11 Ala. 427; Doe v. Bates, 6 *ib.* 480; 20 *ib.* 427; 12 Wheat. 177.

CHILTON, C. J.—1. Under the facts of this case, we feel no hesitation in holding the judgment of the Circuit Court to be correct.

The statute by which the validity of the deeds under which the defendant claims must be tested, declares that "All deeds and conveyances of personal property, in trust to secure any debt or debts, shall be recorded, in the office of the clerk of the county court of the county wherein the person making such deed or conveyance shall reside, within thirty days, or else the same shall be void against creditors

and subsequent purchasers without notice; and if any such conveyance be made of real estate, the same shall be recorded, in the office of the clerk of the county court of the county wherein the estate may be situate, within sixty days, or the same shall be void against creditors or subsequent purchasers without notice."—Clay's Digest, pages 255–56, § 5.

It will be observed that this statute uses the same language in respect to deeds of both personal and real property, except that thirty days are allowed for recording deeds of trust of personalty, and sixty days as to real property. If not so recorded, they are equally void as to creditors and subsequent purchasers without notice. The same rules of construction equally apply to each. In respect of personal property, it is well settled, that if a lien attaches in favor of a judgment creditor, before notice of a deed not duly recorded, the purchaser is protected, although, at the time of the purchase, he may have had notice of such deed.—Wallis v. Rhea & Ross, 10 Ala. R. 451; same parties, 12 *ib.* 646; Jordan v. Meade, 12 *ib.* 247; Chamberlain v. Adams, in MS., per Dargan, C. J. The same rule, for similar reasons, must apply to deeds conveying real estate.—See Avent v. Read, 2 Stew. 488; Malory v. Stodder, 6 Ala. 801; Daniel v. Sorrells, 9 Ala. 436.

2. As the Bank in this case had, at the time the judgments against Batre & Co. were rendered, and when it acquired a lien on the land, no notice of the deed of trust executed in 1840, and as that deed was not recorded within the time prescribed by the statute, it was void as against the Bank; and being void as to it, is void as to any one who purchases under the judgment when the land is sold in the enforcement of the lien. The protection of the Bank is extended to the purchaser, otherwise the lien would be rendered ineffectual. Daniel v. Sorrells, 9 Ala. 436, and cases above cited.

3. The deed, being void as against the Bank, could not operate to place the title beyond the lien of its judgment. Batre, notwithstanding the deed, is, as to the Bank, the legal owner of the land; and the purchaser, who acquires all the title which the law authorized the Bank to sell under its execution, himself acquires the legal title.

4. As to the question whether the Bank had actual notice of the deed, and which the appellant's counsel thinks might be

inferred from all the circumstances, it involves an inquiry into a matter of fact, which we can no more revise than if it had been found by a jury ; the court having tried it by consent of the counsel in lieu of the jury.—*Malempre v. Etheridge*, 18 Ala. 565.

5. Neither can it be maintained that the lien of the Bank was lost by not issuing executions, the judgment itself not having become dormant.—*Turner v. Lawrence*, 11 Ala. 426 ; 20 *ib.* 427 ; 12 *Wheat. R.* 177.

6-7. Nor was the judgment rendered dormant by the acts of the general assembly putting the Bank in liquidation. The power to proceed to collect in the name of the Bank was expressly reserved to the assignees, or trustees, appointed to settle its affairs ; and authority given them to dispose of the judgment by sale and assignment is an implied power conferred by the act on the purchaser to have execution of it. Where a sale is required to be made, the right to enjoy the purchase and render it available to the purchaser passes as an incident. Again:—The statute should receive such construction as would carry out the design of the legislature in its enactment. It could not have been the design of the legislature to depreciate the assets of the Bank, by changing their character, and destroying liens which may have attached for the satisfaction of them, by rendering judgments dormant as soon as sold, and putting purchasers to the expense of new proceedings for their revival. This expense would, of course, lessen their value to the Bank. The enforcement of a judgment, already obtained in the name of the Bank, is unlike the institution of a new suit to recover upon the assets of the Bank, which, as we have decided, can only be done in the name of the Bank by the trustees appointed to take charge of the assets.—*Jemison v. Planters & M. Bank*, 17 Ala. 754.

8. It is objected by appellant, that there was no proof of the demand on which the judgment was rendered. The answer is, that no such proof is required of the purchaser under execution. He produces his sheriff's deed, and the record of the judgment and execution conferring upon the sheriff full authority to make the sale. This is sufficient to pass all the legal title the defendant in the execution had at the time the judgment was rendered.

Whether the appellant would not, as against such purchaser, be required to prove the existence and *bona fides* of some of the demands provided for in the trust deed, before it could avail him, is a question it is unnecessary to decide; for the view we have taken above is conclusive of the case in this court.

Let the judgment be affirmed.

### GERALD AND WIFE vs. MCKENZIE ET AL.

[BILL IN EQUITY, FILED BY HUSBAND AND WIFE, TO PROTECT THE WIFE'S SEPARATE ESTATE, SECURED BY MARRIAGE SETTLEMENT, FROM SALE UNDER EXECUTION AT LAW.]

1. *Husband, as trustee, may interpose a claim at law.*—If no trustee is provided for in the marriage settlement, the legal title to the separate estate of the wife is necessarily vested in the husband, if he reduces the property into possession; and having the legal right, he may interpose a claim at law, when her property is levied on, and try the right of property.
2. *But wife cannot compel him to interpose, and may therefore come into equity.*—But, although the husband, in such case, may assert his legal title at law, yet the wife cannot compel him to do so, and for this reason she may at once apply to a court of equity for the protection of her rights.
3. *Provisions of Code (§ 2131) apply only to separate estates created by law.*—Section 2131 of the Code, which authorizes the wife to sue alone when the suit relates to her separate estate, applies only to separate estates created by statute, and not to those which were created by the act of the parties before the existence of the statute.
4. *Bill filed by husband and wife held her bill alone.*—When a bill, which is filed in the name of husband and wife, concerns only the separate estate of the wife, seeks only to establish and protect her rights and interests, and asks no relief for or against her husband, it will be regarded as the bill of the wife alone, and the husband will be considered only her trustee or next friend.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. WADE KEYES.

THIS bill was filed by the appellants, (Pearly S. Gerald, and Camilla, his wife,) to protect certain slaves, in which Mrs. Gerald claimed a separate estate, from sale under execution



at law, at the suit of John McKenzie against Justus Wyman. It alleged, in substance, that the complainants, in 1837, prior to their marriage, entered into a marriage contract, by whose terms all the property of the said Camilla was settled to her sole and separate use, free from the control and dominion of her husband, but no trustee was provided for, nor has any been since appointed; that, in 1852, Mrs. Gerald, through her husband, purchased the negroes now in controversy from said Justus Wyman, in satisfaction of a judgment which she had previously recovered against him and others; that said negroes were allowed to remain in the possession of said Wyman under a contract of hiring, and, while in his possession under said contract, were levied on as his property under execution in favor of said McKenzie; that said McKenzie indemnified the sheriff to make said levy, and is urging him to sell; and that said Wyman is the only witness by whom said contracts of sale and hiring can be proved.

The chancellor dismissed the bill for want of equity, and his decree is now assigned for error.

N. HARRIS, and ELMORE & YANCEY, for appellants:

1. The allegations of the bill as to the sale of the slaves under execution, their probable loss, and the threatened multiplicity of suits against different purchasers, are sufficient to give the court jurisdiction.—*Calhoun v. King*, 5 Ala. 525; *Walker v. Miller*, 11 *ib.* 1067; *Lewis v. Hudson*, 6 *ib.* 465; 2 Story's Equity, § 845.

2. The fact that Mrs. Gerald had no trustee appointed to hold the property, gave the court jurisdiction. When a separate estate is secured to the wife under a marriage settlement, and no trustee is appointed by the deed, the husband is only regarded as her trustee in equity: he has no right to sue for the property in a court of law.—2 Story's Equity, § 1380; *Harkins v. Coulter*, 2 Port. 465; *Fellows, Wadsworth & Co. v. Tann*, 9 Ala. 1003. The bill prays for general and "appropriate relief"; under which prayer, and the facts stated in the bill, it would be the duty of the court to appoint a trustee, "who shall become a depositary of the legal estate." *Fellows, Wadsworth & Co. v. Tann*, *supra*.

3. The fact that Wyman was the only witness to the con-

tract of hiring, gave the court jurisdiction.—*Jordan v. Loftin*, 13 Ala. 548. Wyman was a competent witness in equity, although declared incompetent by the Code on the trial of the right of property at law.—Code, §§ 2289, 2291, 2921 ; *Kirksey v. Dubose*, 19 Ala. 50, and cases there cited, as to the construction of the old statute.

WM. B. MOSS, *contra*:

1. There is no equity in the bill. The title set up to the slaves levied on, is purely a legal title, and might be asserted at law, either by the interposition of a claim under the statute, or in trover, detinue, or case. No circumstances are shown, which could prevent a court of law from giving adequate compensation in damages.—Code, §§ 602, 2587, 2588 ; *Bissell & Carville v. Lindsay*, 9 Ala. 162 ; *Marriott & Hardesty v. Givens*, 8 *ib.* 694. Whether the legal title is in Mrs. Gerald, or in her husband, makes no difference. If it is in him as trustee, he has all the above-mentioned or other adequate remedies at law, and there is no allegation that he refuses to sue, or to put in a claim.—9 Ala. 162 ; *ib.* 364. If it is in the wife, (and it must be in one or the other of them,) she has the same remedies in her own name, it being her separate property : she could seek redress at law, or put in a claim under the statute.—Code, §§ 602, 2131.

2. That the slaves are hired out for the year, and therefore complainant could not sustain a claim under the statute, if it be a true proposition, would only be ground for a bill *quia timet*, which this is not : it is a bill to investigate the right of property, and prays a perpetual injunction.—*Nance v. Cox*, 16 Ala. 126. But the proposition itself is denied. If the interest of the bailee was subject to execution, as in case of a mortgagor before the law-day, there might be ground to resort to equity to preserve the security ; but the interest of the defendant in execution in the property is specially exempted from levy by the Code (§ 2455.) The right of possession is not in issue, but the right of property.—Code, § 2588.

3. A right to the statutory remedy, unless section 602 of the Code be held merely declaratory, excludes the right to resort to equity. It is not merely declaratory of the common law, for the reason, that the language forbids such a construc-

tion. The common-law rule had its fixed and certain verbiage and terms—viz., “a plain and adequate remedy at law.” Before the adoption of the Code, cumulative statutory remedies were held not to take away equity jurisdiction, because the rule was always construed with reference to the distinctive features of the systems in England, from which we get both our common-law and equity jurisprudence. But the legislature has adopted new terms and a new verbiage : instead of the language of the old rule, we now have “a plain and adequate remedy provided in the other judicial tribunals.” This, therefore, must have been intended to adapt the chancery jurisdiction to our own system provided by the Code ; which conclusion is strengthened by the fact, that the spirit of our whole recent legislation has been, not to enlarge, but to limit the jurisdiction of equity, by providing against the necessity of frequent resort to it. By showing, then, that complainant had “a plain and adequate remedy provided in the other judicial tribunals,” she has no right to come into equity.

4. That the defendant in execution is the only witness by whom the retention of possession can be explained, furnishes no ground for equity jurisdiction. No discovery is sought from the execution creditor ; Wyman is merely a witness ; and the complainants resort to equity, to evade the statute which, from a wise public policy, has made him incompetent. Story’s Equity, §§ 1489, 1499. They could, however, have had the benefit of his testimony, in trover, detinue, or case.

GOLDTHWAITE, J.—As there was no trustee provided by the marriage settlement, the legal title necessarily vested in the husband by the marriage, if he reduced the property into possession, for the reason, that the separate estate created in the wife by the settlement is the creature of equity alone, and the possession could not in a court of law be referred to it, and must therefore be considered as attaching to the husband in that character. We concede that, having the legal right, he might have maintained an action at law for any direct or consequential injury done to the property, and, also, that he might interpose a claim and try the right under sections 2587, 2588, 2589, &c., of the Code.

We agree, also, that the mere fact that a trust has been

created, is not, of itself, sufficient to carry the property into equity; and give jurisdiction to that court to determine disputes which may arise in relation to it (Colburn v. Broughton, 9 Ala. 351; Marriott v. Givens, 8 Ala. 694); and this principle applies, in cases where there is some one who is not only clothed with the legal title, but invested with the duty of executing the trusts. In such case, there is an obligation resulting from the acceptance of the trust, to take such measures as may be essential to its protection. But by the law of marriage, no such duty devolves upon the husband. He may assert his legal title in a court of law, if he chooses to do so, but the wife cannot demand it of him; and she can at once apply to a court of equity, which interposes to protect the trust created for her benefit, on the ground that the law confers upon her no right to call upon another to interfere in her behalf, in a legal tribunal. This identical question was, in fact, decided in Crabb v. Thomas, 25 Ala. 212.

It is urged, however, on the part of the appellee, that under the Code (§ 2131) the wife is authorized to sue in her own name, in a court of law, whenever the suit relates to her separate estate. Whether the terms of this section are broad enough to warrant a suit by the wife for damages, for the injury or conversion of the property to which the section applies, or to institute in her own name a claim to try the right, it is unnecessary now to decide, as we are of the opinion that the section referred to does not apply to the separate estate of the wife which, as in this case, was not created by the law, but by the act of the parties before the existence of the law. What we mean by this is, that the statute has created for the wife an estate, which it has declared shall not be subject to the debts of the husband (Code, § 1982), and to which certain incidents are attached (§§ 1983, 1987, 1989); and this estate is the only separate estate which the Code recognizes, and its provisions have no application to equitable estates or interests in the wife which were created by the act of the parties before the passage of any statute, and to which other and different incidents attach.

It follows, that as Mrs. Gerald could not sue at law as a *feme sole*, nor call upon her husband as a matter of right to interpose his legal title for her protection, chancery is the



only forum to which application could be made ; and although the bill is in form the bill of the husband and wife, yet, as in substance and in fact, it only concerns the separate estate of the wife, and seeks only to establish her rights and protect her interests, and asks no relief for or against the husband, he will be regarded as her next friend, or trustee, and the bill taken as if it had been thus framed.—*Michan & Wife v. Wyatt*, 21 Ala. 813.

In relation to the merits of the suit upon the evidence, we say nothing, for the reason, that they were not passed upon by the chancellor.

Decree reversed, and cause remanded ; the appellees paying the costs of this court.

### McCARGO & CORDLE vs. CRUTCHER.

[POINTS OF PRACTICE WHERE INTERROGATORIES ARE FILED UNDER THE STATUTE.]

1. *Motion to suppress answers, when and how made.*—The party filing interrogatories to his adversary has the legal right to move the suppression of the answers, or any part of them, before the commencement of the trial ; and if he wishes to review on error the action of the court on his motion, the proper practice, *it seems*, is to decline to read the answers on the trial.
2. *Refusal of court to decide such motion when made, reversible error.*—If the court, at the time such motion is made, “declines to sustain or overrule said motion, remarking that it would decide on the motion when the facts of the case were developed” ; and the party making the motion excepts to the action of the court, and then declines to read the answers on the trial, he is entitled to a reversal of the judgment obtained against him, if any portion of the answers embraced in the motion contained illegal evidence. (*CHILTON, C. J., dissenting*, held, that it was error without injury, since the court might properly have overruled the motion.

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. GEORGE D. SHORTRIDGE.

ASSUMPSIT by Reuben Crutcher against the appellants, as partners, on a promissory note for \$1681 68. The defendant Cordle, who alone defended the action, filed interrogatories

under the statute to the plaintiff, touching the execution of the note declared on and other matters; and the plaintiff filed his answers thereto within the prescribed time. At the trial term, and before the trial of the cause commenced, the defendant (among other motions) moved the court to suppress the plaintiff's answer to the third interrogatory; "but the court declined to sustain or overrule said motion, remarking that it would decide on the motion when the facts of the case were developed; to which the defendant excepted." All the other motions to suppress were overruled; and the bill of exceptions states, that "after the refusal of the court to suppress the plaintiff's answers, as hereinabove shown, the defendant did not, on the trial of the cause, offer to read said answers as evidence."

The action of the court in thus declining to decide this motion at the time it was made, together with other matters which need not be here stated, is now assigned for error.

ROBINSON & JONES, BRICKELL & CABANISS, and J. W. SHEPHERD, for the appellant.

WM. H. WALKER, *contra*.

RICE, J.—The court is not *bound* to admit any illegal evidence, nor is it *bound* to exclude any legal evidence. These two simple and undeniable propositions explain and reconcile many decisions of this court, which, without examination, may not appear to be founded on sound legal principles. Some of those decisions declare, that when a party moves to introduce evidence, part of which is legal, and part illegal, the court commits no error in overruling the motion.—*Smith v. Zaner*, 4 Ala. 99; *Hiscox v. Hendree*, at the present term. Others declare, that when a party moves to exclude evidence, part of which is legal, and part illegal, the court does not err in overruling the motion.—*Hrabowski v. Herbert*, 4 Ala. 265; *Melton v. Troutman*, 15 *ib.* 535. Others declare, that when the plaintiff moves to introduce evidence, part of which is legal, and part illegal; and the defendant moves to exclude it, without distinguishing between the legal and illegal portions, the court, in such case, does not err either in overruling or granting either of said motions.—*Gibson v. Hatchett*, 24 Ala. 201; *Hiscox v. Hendree*, at the present term,

In all these cases, the action of the court was sustained upon the solid ground, that it *decided* the question presented by the motion, and, in making its decision, *did not deny any legal right to either party*. In none of the cases has it been held, that the court might lawfully *decline* "to sustain or overrule" any motion of the kind until the facts of the case were developed on the trial before the jury; but on the contrary, it is the settled doctrine in this State, that it is the duty of the court, to decide the question of the relevancy or admissibility of evidence, at the time that question is first properly presented for its decision.—*Bilberry v. Mobley*, 21 Ala. 277.

When a defendant files interrogatories under the statute to the plaintiff, and answers are filed to them, the defendant has the legal right to move to suppress the answers, or any part of them, before the commencement of the trial; and when such motion is made at the term at which the trial is had, but before the trial begins, it is the duty of the court to decide the motion before the trial is commenced. And where the record shows that such motion was made before the trial, and at the term at which the trial was had, and that "the court *declined* to sustain or overrule said motion, remarking that it would decide on the motion when the facts of the case were developed", and that the defendant excepted, and that the trial immediately afterwards was had, and that the defendant did not on the trial offer to read said answers, and that at least a portion of the answers embraced by the motion was illegal evidence,—the defendant is entitled to a reversal of the judgment obtained against him. Under the facts shown in this record, the court below erred in *declining* "to sustain or overrule" the motion of defendant to suppress the answer of plaintiff to the third interrogatory.—*Pritchett v. Munroe*, 22 Ala. R. 501; *Reese v. Beck*, 24 *ib.* 651; *Scott v. Baber*, 13 *ib.* 182.

Even if it be conceded, that the motion to suppress that answer embraced some legal evidence, as well as some illegal evidence, and that therefore the court would not have committed an error in overruling said motion; yet that does not obviate or cure the error in *declining* either "to sustain or overrule" said motion. If the court had overruled the motion, we cannot say that the defendant would not thereupon have

moved to suppress only that portion of the third answer which is illegal evidence, and have distinctly specified this illegal portion in his motion. It was his *legal right* to have the *decision* of the court upon his motion as made. This *legal right was denied* by the court's declining "to sustain or overrule" the motion; and the record does not show us clearly, that he was not injured by this denial of his legal right. To withhold a reversal in this case, would be to give our sanction to a practice which is not defensible, and would arm the primary courts with a discretion unsanctioned by law.

When the motion to suppress is one which the court is *bound* to overrule, if it obeys the law,—as when it embraces only illegal evidence,—then the failure of the court to decide such motion, cannot be injurious to the party making it, and is not a reversible error. But when the motion is one which the court may, without error, either grant or overrule, or when it is one which the court is bound to grant, if it regards the law, then if the court, *declines* either to grant or overrule it until the facts are developed before the jury, there is error for which there must be a reversal.

For the error above pointed out, without noticing any other question, we reverse the judgment, and remand the cause.

CHILTON, C. J.—In my opinion, the bill of exceptions shows that the appellant sustained no injury by the refusal of the court to exclude the evidence objected to. The appellant must show error which could have worked an injury to him. Here, the cause is reversed, because the court failed to decide upon a motion to exclude evidence, which motion, it is conceded, the court might properly have overruled.



HILL AND WIFE *vs.* McRAE.

[BILL IN EQUITY BY JUDGMENT CREDITOR, WHO HAS EXHAUSTED HIS LEGAL REMEDIES, TO SUBJECT DEBTOR'S EQUITABLE ESTATE.]

1. *Debtor's beneficial interest in property bequeathed to trustee for use and benefit of him and his family, but not to be liable for his debts, cannot be subjected in equity by his creditors.*—A bequest to a trustee of a certain share of the testator's estate, "for the use and benefit of his son Thomas", contained these provisions: The property was to be held, used, and managed by the trustee, who was also empowered, with the assent of the said Thomas, to sell the slaves, and to reinvest the proceeds of sale in other property to be held on the same trust. The trustee was expressly forbidden to pay any of the debts of the said Thomas, and was directed "to pay over to the said Thomas, from time to time, such part of the income of the said trust estate (or the whole thereof, if required) as may be necessary for the comfortable and reasonable support of the said Thomas, and of his wife and children, should he have any; the same to be used by the said Thomas." On the death of the said Thomas, the property was to be disposed of in such manner as he might by his last will and testament direct; if he died intestate, leaving a wife or child, the property was to be delivered over to them; and if he left neither wife nor child, it was to return to the testator's estate, and be distributed as though no such bequest had ever been made. The said Thomas was unmarried at the time of the testator's death, but subsequently married, and his wife was living when this bill was filed against him. *Held*, that the bequest was intended as a prospective provision for the debtor's wife and children as well as for himself, that his wife took a joint interest with him in such portion of the income of the trust estate as might be necessary for their comfortable and reasonable support, and that no portion of the income could be subjected in equity by his creditors.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. WADE KEYES.

THIS bill was filed by Daniel McRae, the appellee, as a judgment creditor of Thomas M. Hill, the principal defendant. The allegations, in substance, were as follows: That complainant recovered a judgment against said Hill on the 9th April, 1851, on which an execution was duly issued, and returned "no property found"; that said defendant has no property, within complainant's knowledge, on which an execution at law can be levied, but he has an equitable interest in certain property, real and personal, which was bequeathed

by his father as hereinafter more particularly stated ; that since the death of said testator, said defendant has married, and his wife is now living, but they have no children ; that the trustee appointed by said testator in his will declined to accept the trust, and thereupon, on said defendant's application, another trustee was appointed by the Chancery Court, into whose possession the trust estate has come.

The will referred to in the bill was executed in October, 1848, and was admitted to probate on the 5th November, 1850. The bequest in favor of said Thomas M. Hill was in these words :

“ I give, devise, and bequeath the share which may be set off to my son Thomas M. Hill, to my son-in-law William B. Lott, in trust for the use and benefit of my said son Thomas ; the same to be held, used, and managed by him, the said William B. Lott. And I do hereby empower the said William B. Lott, if in his discretion he shall deem it advisable, and for the interest of the said Thomas, and that the said trust estate would be benefited or increased thereby, and the said Thomas shall assent and agree to the said disposition, to sell the said negroes, and to re-invest the proceeds in other property, or in stocks which may be considered good and promise to pay fair dividends, or in lands, and, if desirable, in other States than the State of Alabama ; and I do direct, that the said William B. Lott do, from time to time, pay over to the said Thomas such part of the income of the said trust estate (or the whole thereof, if required) as may be necessary for the comfortable and reasonable support of the said Thomas, and of his wife and children, should he have any,—the same to be used by the said Thomas ; and the said William B. Lott is expressly forbidden to pay any of the debts of the said Thomas M. Hill. And should the said Thomas M. Hill die, having made a will and testament in due form to be admitted to probate, I do direct that the said trust estate shall be handed over and disposed of in such manner as the said Thomas shall by his said will have directed ; should he die leaving a family, either a wife and children or either, that then the said trust shall also cease and determine, and the said estate be delivered over to such wife or children, or their guardian, and the said William B. Lott be discharged ; should he die

leaving neither wife nor children, I do direct that said estate shall then return into my estate, and be distributed among my other children, or their representatives, precisely as though it had not been given for the use of my said son."

The said Thomas M. Hill, his wife, and their trustee, were made defendants to the bill; and the prayer was, that a decree might be made "subjecting the proceeds of said trust estate to the satisfaction of complainant's judgment," and for general relief. The defendants demurred to the bill for the want of equity, and, on their demurrer being overruled, declined to answer. A decree *pro confesso* for want of an answer was then entered against them, and a decree final subjecting the income of the trust estate to the satisfaction of complainant's judgment; and a reference to the master was ordered. The overruling of the demurrer to the bill, and the final decree rendered, are now assigned for error.

TURNER REAVIS, for the appellants:

It is insisted on the part of the appellants, first, that Thomas M. Hill has no interest in the bequest for his benefit which can be subjected to the payment of his debts; and, secondly, that if he has any such interest, it is only that portion of the income which would be necessary for his own comfortable and reasonable support, and not that portion which would be necessary for the support of himself and his wife.

1. This case is unlike *Rugely & Harrison v. Robinson*, 10 Ala. 702, where the bequest was, that all the rents, profits, and hires should be held for the use and benefit of the son and his family. Here, the bequest is to a trustee, who is required to use, hold, and manage the property, and from time to time to pay over to the son such part of the income as may be necessary for the comfortable and reasonable support of the son, his wife, and children. The son having no right under the bequest, except to a comfortable and reasonable support for himself and his wife, his interest is inseparable from hers, and consequently, according to the principles settled in the case of *Rugely & Harrison v. Robinson*, cannot be subjected to the payment of his debts.—See opinions of Ormond and Goldthwaite, JJ., pp. 738, 742-3. The following cases are also expressly in point: *Godden v. Crowhurst*, 10 Sim. 642; *Two-*

penny v. Peyton, 10 *ib.* 487; Wetherell v. Wilson, 1 Keen, 81; Kearsley v. Woodcock, 3 Hare, 185.

This case differs not only from *Rugely & Harrison v. Robinson*, but from all the other cases on the subject in which the trustees were directed to apply the whole income. Here, he is only to pay over such part of the income as may be necessary for the comfortable and reasonable support of the son and his wife. The amount necessary for this purpose rests in the discretion of the trustee, and is fluctuating: the amount necessary at one time might be wholly insufficient at another; sickness in the family, and increase in the cost of the means of living, would require a larger amount of the income at one time than at another; and a large portion might be requisite for the rent or purchase of a house to live in, and for obtaining necessary furniture, &c. How then is it possible to separate the interest of the son from that of his wife? If this cannot be done, then, according to the case of *Rugely & Harrison v. Robinson*, Thomas M. Hill has no interest which can be subjected to the payment of his debts.

If, however, under the influence of *Rugely & Harrison v. Robinson*, Hill has such an interest as may be subjected by his creditors, then it is insisted for the appellants, with due deference, that that case is not law; and this is the more readily done, since this court, in 19 Ala. 411, has given an intimation that it is not satisfied with that decision. In support of the position that that case is incorrect, the court is referred to the argument of the counsel in the case, and in 19 Ala. 404, and to the opinion of C. J. Collier, in 10 Ala. 716. No American case which sustains that decision has been found; but there are several in direct conflict with it, to which the attention of the court is respectfully asked. They are, 3 Gratt. 335; 4 Leigh, 550; 1 *ib.* 443; 5 Munf. 86; 5 Watts & S. 323; 15 N. H. 314; 10 Metc. 188; 7 Watts, 551.

In this case, the bequest is not only merely for the support of the testator's son and his wife, but the trustee is expressly forbidden to pay any of his son's debts. Can the court compel him to do what the testator says he shall not do? What principle of public policy requires that the support of the son shall be taken to pay his debts, contrary to the express words of the bequest? We have no bankrupt or insolvent laws, on



which it can be said that such a bequest is a fraud ; and if we had, it might as well be said, that if the testator, instead of making a bequest to his son, had disinherited him because he was in debt. that would be a fraud which would enable his creditors to charge the estate for the share to which the son would have been entitled if he had not been disinherited.

2. But, if Thomas M. Hill has such an interest as can be separated from that of his wife, it is very clear that only so much of the income can be subjected as may be necessary for *his* support, and that a proper allowance should be made to the wife ; and consequently, the decree of the chancellor, which subjected the whole income, is erroneous.—*Rugely & Harrison v. Robinson*, *supra* ; 3 Hare, 185 ; 2 Y. & Coll. 98 ; 3 Beav. 20 ; 2 *ib.* 62. The decree is erroneous, also, even supposing that *all* of the income necessary for the support of the husband and wife is liable to his debts ; for it subjects the *whole* income, while the trustee is only authorized to pay over *such part* as may be necessary for their support.

Each clause of the will creating the bequest must be construed with reference to the others ; and, taken together, they clearly show that the property is bequeathed to the trustee, to be by him held, used, and managed so as to derive a revenue from it ; of which revenue a sufficient portion is to be paid over to the beneficiary for the support of himself, his wife, and children. The fact that the amount thus to be paid over is to be used by the son, makes no difference : the trust for the wife and children is nevertheless complete.—*Wetherell v. Wilson*. 1 Keen, 80, (15 Eng. Ch. R. 81.)

S. F. HALE, *contra* :

It is a well established legal proposition, that all of a man's property, or interest in property, whether legal or equitable, is subject to the payment of his debts, if it can be reached and subjected without disturbing the virtual rights of others in the same property. Public policy inhibits the existence of a different rule ; and, indeed, this rule is not contradicted by the appellants' counsel. What interest, then, does Thomas M. Hill take in the property bequeathed by his father ? In the first part of the bequest, the testator uses this language, "I give, devise, and bequeath the share which may be set off

to my son Thomas M. Hill, to my son-in-law William B. Lott, in trust for the use and benefit of my said son Thomas,—the same to be held, used, and managed by him, the said William B. Lott.” Now it is clear, if the will had stopped here, that it would vest the legal title to the property conveyed in William B. Lott as a naked trustee, and the whole use, or valuable interest in the property, in Thomas M. Hill. It is equally clear that he takes that interest separately, and not jointly with any other person; and that he takes this use without any limitation or restraint upon his right to alienate the same. The *corpus* of the property is only to be held by the trustee, subject to the trust declared by the will. It is clear, then, that this use, which is valuable property, and which, holding it separately and not jointly with another, he has the power to sell and dispose of, is liable to the payment of his debts; and we look in vain to the subsequent parts of the will for anything which changes the use first declared, or which invests any one else with a joint interest in that use.

The only clause of the will which can be supposed to have any such effect, is to be found in these words—“And I do direct that the said Wm. B. Lott do, from time to time, pay over to the said Thomas such part of the income of the said trust estate (or the whole thereof, if required) as may be necessary for the comfortable and reasonable support of the said Thomas, and of his wife and children, should he have any,—the same to be used by the said Thomas.” In this clause, the *corpus* of the property bequeathed is recognized as the trust estate, and there is no new declaration of the use of the property for the maintenance of the wife and child of the said Thomas; but, on the contrary, the testator expressly provides, that the income, or so much as may be necessary for the reasonable support of the said Thomas, and of his wife and children, should he have any, shall be paid over to the said Thomas—not for the use of the child, but “to be used by the said Thomas.” Now, as the said Thomas has the unrestricted right to use the sum paid over to him under this provision of the will, he certainly could sell, or dispose of it as he thinks proper. There is no declaration that he should use the sum thus paid over to him by the trustee for the support of his wife and children; nor is any trust declared in their favor,

and therefore nothing limiting his right to sell and dispose of the same as he may think proper ; nor is there any disposition over to a third person, of the remainder of the proceeds and profits of the trust property not paid over to the said Thomas. It follows, therefore, as the whole use of the trust property is given to said Thomas by the first clause of the bequest, and as there is no subsequent declaration of trust in favor of any other person, nor any limitation of any part of the use or profits of the trust property, that they must be subject to the payment of his debts.

But if this view should be incorrect, certainly Thomas M. Hill takes a joint interest with his wife ; and as this use does not consist of a house, furniture, household servants, nor any other thing incapable of severance, the court should order an account to be taken of his interest in the use of the trust property, and subject that to the payment of his debts.—*Rugely & Harrison v. Robinson*, 10 Ala. 702.

CHILTON, C. J.—When the testator directs the trustee to pay over to his son, from time to time, such part of the income of the trust property (or the whole, if required) as shall be necessary for the comfortable and reasonable support of the said Thomas, and of his wife and children, should he have any, &c., to be used by said Thomas, we understand him as intending a provision for the wife and children as well as for his son,—a prospective provision, of course, for the former, for then the son was not married. He had a wife, however, when the bill was filed, and the provision embraces her, as one of the contemplated objects of the testator's bounty. The fact that the will provides that the profits of the trust which are necessary for 'the comfortable and reasonable support of Thomas and his wife,' &c., are "to be used by the said Thomas," does not defeat the wife's right to a support, but makes the husband a sub-trustee for the wife, to the extent of her share of the profits. Any other construction would evidently do violence to the intention of the testator. The cases of *Spear v. Walkley*, 10 Ala. 328, and *Jasper and Maclin v. Howard*, trustee, 12 *ib.* 652, show that the provision enures for the benefit of the wife, and being a provision in trust for her support, the same does not vest in the husband. It is very clear, there-

fore, that the portion of the profits necessary for the support of the wife, cannot be subjected in equity to the payment of the husband's debts.

But can the court of equity properly subject any part of the income of the property to the payment of the husband's debts? It will be borne in mind that the trust is executory. The trustee is to retain and manage the property, and is invested with power to change its character, by the consent of Thomas M. Hill, and purchase other property; and in case Thomas should not dispose of it by will, ulterior limitations are engrafted on it. It was evidently in the contemplation of the testator that the fund should be increased by the management of the trustee; and he was only permitted by the terms of the will "to pay over to said Thomas *such part* of the income of the said estate (or the whole thereof, if required) as might be necessary for the comfortable and reasonable support of the said Thomas and of his wife and children," &c. It was further provided, that the trustee was expressly forbidden to pay any of Thomas' debts. Now, was it competent for the testator to make such will? If the law will not permit such bequest to stand, then it is out of the power of a benefactor, or a father, to provide for the support of the family of an improvident friend, or of a child. It is said, to secure a benefit in property, or its use, or the profits thereof, to one in such manner as not to be liable to the debts of the beneficiary, is a fraud upon his creditors, and opposed to public policy; that large estates may be thus tied up, and the beneficiaries of them may be supported out of them and set creditors at defiance. It is a sufficient answer to this, that the creditor had no claim upon the donor, and that he is placed in no worse condition than if the gift had not been made. Nay, he is in a better condition, in so far as the provision for the debtor's support and that of his wife will enable the debtor to appropriate all he makes to the satisfaction of the debt. As there was no law, nor any public policy, contravened by the father while living in supporting the family of an indigent or improvident child; so, when he is dead, his bounty may be expended in the accomplishment of that result without a violation of law. True, if the corpus, or rents and profits, be given to the son, or in trust for his use, in such manner as to



be capable of identification and separation, it can be reached by his creditors, either in a court of law or equity; but where the rights of third parties intervened, and the interest of the son is so blended with the interest of such third party, as that it cannot be separated and subjected without injury to such other interest, the creditor cannot reach it.

In the case before us, the provision is for the comfortable and reasonable support of Thomas and his wife. It is a joint benefit conferred upon both, as we must intend it was contemplated by the testator that they were to subsist at the same board, and enjoy their support as is common to the relation of husband and wife; and no more is to be paid by the trustee than is necessary for their support. The payment of money to the son, which is necessary to purchase provisions, or other things required for the comfortable support of himself and wife, must be looked upon as but the means of executing the trust,—in other words, the court regards the money provided for the purchase of the means of support as impressed with the character of those means, and will no more subject it than the means themselves. To illustrate:—If the trustee had paid the husband fifty dollars to purchase sugar, coffee, and salt, as the means of subsisting himself and wife, the court would no more impound the money in the husband's hands than it would the provisions in the purchase of which it had been expended, if he had laid it out in the execution of the trust. The donor, or testator, has an individual right of property, as has been well said, in the execution of the trust; and to divert it to a person, or purpose, not intended, would be an invasion of his dominion, and a fraud upon his generosity. It would be to cut off improvident families from all sources of benevolence, and interpose a perpetual barrier to the exercise of paternal duty. Such is not the law.—*Holdship v. Patterson*, 7 Watts, 551; *Ashurst v. Given*, 5 Watts & S. 330; 10 Sim. 642; *ib.* 487; 3 Hare, 185; 3 Gratt. 335.

This case is unlike that of *Rugely & Harrison v. Robinson*, 10 Ala. 702, in which the provision was not for the support of the beneficiaries, and was limited to such part of the profits as should be necessary for such purpose.

We feel satisfied that the decree is erroneous; it is therefore reversed, and the cause will be remanded.

## SIMS vs. McEWEN'S ADM'R.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF PAROL CONTRACT.]

1. *Vagueness and uncertainty in contract alleged.*—Where the alleged contract was, “that upon the purchase by said defendant of said lot and improvements, he and complainant were to have and own jointly all the estate purchased as aforesaid—that is to say, said defendant was to own one-half of said property, and complainant one-half of said property; complainant to superintend the erection of certain buildings of brick, as mentioned in the deed of mortgage on said lots, to repay to said defendant the moneys by him paid out (and the interest thereon) on account of said purchase, and on account of said buildings, and for all provisions, horses, wagons, and mules furnished by him for the benefit of said firm; and complainant to take charge of the same as a hotel, and have one-half the profits thereof, and one-half of the rents thereof, and the said proceeds to be applied to the payment of said debt,” &c.—the court inclined to the opinion, that a specific performance might be refused, on the ground that the agreement as alleged was too vague and uncertain; but the bill was dismissed on other grounds.
2. *Inability of complainant, by reason of insolvency, to perform his part of contract.*—In the exercise of a sound discretion, equity will refuse to enforce the specific execution of a contract in favor of one party, when it is uncertain whether he can fulfil the stipulations of the contract on his own part; as where (in this case) complainant's insolvency rendered it doubtful whether he would be able to pay his share of the purchase money yet due, or to repay the advances made by defendant.
3. *Dissolution of partnership by death.*—The death of a partner dissolves the partnership, if there is no stipulation for its further continuance.
4. *Variance between allegations and proof.*—When the contract set up in the answer and proved is materially different from that alleged in the bill, although the defendant may have a specific performance without resorting to a cross bill, yet the same rule applies to the plaintiff as in other cases—he must prove the case made by his bill.
5. *Matters dehors the contract.*—If a party seeks the specific execution of a contract in equity, he cannot have relief for matters which are not embraced in the contract.
6. *Compensation incidental to relief in absence of special equity.*—If the plaintiff does not make out a case which entitles him to a decree for specific performance, compensation for damages resulting from a breach of the contract, or for services performed under it for which he may recover at law, will not be decreed him, unless some special equity intervenes.
7. *Services performed under void (because parol) contract recoverable at law.*—Although an action at law cannot be maintained for the breach of a contract which is void under the statute of frauds because not reduced to writing, yet a recovery at law may be had for services performed under it.

Sims v. McEwen's Adm'r.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by John C. Sims against the administrator of James A. McEwen, deceased, to enforce the specific execution of a parol contract. Its allegations, in substance, are as follows: That said McEwen purchased from one Jackson, on the 29th November, 1852, a certain lot in the town of Cahaba, with the improvements thereon, at the price of \$7,000, and received a deed for the same from said Jackson; that the purchase money was not paid at the time, but it was secured by five promissory notes, each for \$1,400, payable on the 1st day of January, 1853, 1854, 1855, 1856, and 1857, and the payment of the notes was also secured by mortgage on the house and lot; that the premises thus purchased, by verbal contract between complainant and said McEwen, were to be held and owned by them jointly; that, by the terms of this agreement, complainant was to superintend the erection of certain brick buildings on the lots, to repay to McEwen the moneys advanced by him on the purchase and other expenses incident to it, to take charge of the house as a hotel, and to have one-half of the rents and profits thereof, which were to be applied to the payment of said debt.

The bill further alleges, that under said verbal contract, complainant entered into the possession of said premises, with said McEwen, on the 30th day of November, 1852, and has since erected a large brick building, which cost (and is worth) about \$8,000, and the annual rent of which is worth at least \$2,200; that he has also expended large sums of money in repairing the old buildings and out-houses; that on the 1st day of January, 1853, complainant and said McEwen opened a hotel in the building, known as "Dallas Hall", and continued the business until the death of said McEwen, which occurred in October of that year; that complainant and the family of said McEwen are still in the possession of the house and premises, but the administrator of said decedent is claiming the exclusive possession and control thereof, and threatens to drive complainant out of possession.

The bill also alleges, that during the last illness of said McEwen, and at his request, complainant "made a written

memorandum of the contract between them, (a copy of which is hereto annexed, marked 'Exhibit C',) which paper was read over to the said McEwen, and was by him acknowledged to be correct; and the said McEwen proposed to sign the said writing as the contract, but complainant objected, because the memorandum was in his handwriting, and was not drawn with the accuracy and perspicuity that was desirable. Said McEwen then proposed to have it drawn in proper form, but stated that he was willing to sign it as written, and said that it was correct."

This memorandum, as exhibited with the bill, is as follows :

"Be it known, that I, James A. McEwen, have bought two lots in the town of Cahaba, known as lots No. —. I am now building a new hotel on the lots, with four tenements below stairs for rent, and John M. Sims is engaged as a mechanic and superintendent of the same; and that I propose to make him interested in said lots and building, after all moneys that I have paid out of my own effects are repaid to me, and the property paid for, according to the lettering of the contract and conditions of the mortgage now on record in the clerk's office in probate. Whereas I have, out of my own moneys, paid \$—— for the building of the hotel and other tenements; and when the one-half the moneys that I have so paid out are replaced by said John M. Sims, with interest, then the said Sims is to be equal(ly) interested in the foregoing property. All moneys that may be derived from the hotel, or from the rents of the house, will be applied to the payment of the property, or for the hire of the hands or materials. All such money so obtained is to be considered as the money of the firm, and each one equally interested; but for all moneys that James A. McEwen has furnished, either directly or indirectly, in money, or horses, wagons, mules, or provisions, the same is to be counted as cash to the concern; and the party of the second part, before he can draw, or claim to be equal in the foregoing premises, all money, with interest, must be paid to the party of the first part. Be it further known, that to entitle the said Sims, the party of the second part, after the buildings are completed, that he, on his part, take charge of the hotel as superintendent, and bind himself to discharge the duties of a superintender as tavern-keeper; he is to at-



tend to the servants, keep the keys, deliver all provisions out of the smoke-house, (or other places that may be kept for deposit and under lock and key)—in other words, he binds himself to do all that lay in his power so to do, to promote the interest of the above concern. And that the party of the first part is to receive all money that may be made by the united efforts of both parties, first and second ; but the party of the first part promises to pay over all moneys that is made by the concern, to the extinguishment of the debts of the concern.”

The prayer of the bill is for a specific performance of the alleged contract, for an injunction against the administrator, and for general relief.

The answer of the defendant denies the existence of the alleged contract, or of any other contract of partnership between the complainant and said McEwen ; denies also that complainant ever entered into possession of the premises under any contract, or erected valuable improvements thereon as charged ; and alleges that complainant was the son-in-law of McEwen, that for this reason he was allowed to reside at the hotel with his family, that he has been fully paid for all the work done by him on the house for McEwen, and that he is insolvent. He also pleads the statute of frauds as a bar, and demurs to the bill for the want of equity.

On final hearing, the chancellor dismissed the bill, but without prejudice to complainant's right to seek compensation for his labor and services in the erection and repairing of the buildings ; refusing the specific execution of the agreement on the ground of uncertainty, want of mutuality, and variance between the allegations and proof. His decree is now assigned for error.

WM. M. MURPHY, for the appellant :

1. The admission into possession, and the erection of valuable improvements with the knowledge and consent of McEwen, constitute sufficient ground for a specific performance of the contract.—Byrd v. Odem, 9 Ala. 756 ; Mortimer v. Orchard, 2 Vesey's R. 243 ; White & Tudor's Lead. Ca. in Eq. vol. 1, p. 564, and authorities cited ; Morphett v. Jones, 1 Swanst. 181 ; Attorney General v. Day, 1 Vesey's (Sr.) R. 221.

2. The doctrine with regard to mutuality of contracts has no application to such a case.—*Sutherland v. Briggs*, 1 Hare's (Eng. Ch.) R. 26; 1 Swanst. 172; 5 My. & Cr. 167.

3. The contract alleged is sufficiently definite and certain, and there is no such variance between the allegations and proof as justifies the refusal of a specific execution of the contract.—*Mortimer v. Orchard*, *supra*; 1 My. & Cr. 177; 6 Ves. 470; *Rhodes v. Rhodes*, 3 Sandf. 279; *Ellis v. Burden*, 1 Ala. 458; *Casey v. Holmes, Bott & Earle*, 10 *ib.* 786; 2 Edw. 50; 14 Johns. 15; 7 Watts & Serg. 172; 10 Paige's R. 527-35.

4. But if the contract was too uncertain for a specific performance to be decreed, complainant should have had a decree for compensation in damages to the value of the improvements erected on the land.—*Mialhi v. Lassabe*, 4 Ala. 713; *Phillips v. Thompson*, 1 Johns. Ch. 150; *Anthony v. Leftwich*, 3 Rand. 238; *Payne v. Graves*, 5 Leigh's R. 561.

5. When a partnership, or an agreement in the nature of a partnership, exists between two persons, and land is required by the partnership as a substratum, the land is in the nature of stock in trade; and the partnership being proved as an independent fact, the court, without regarding the statute of frauds, will inquire of what the stock consisted, and the survivor will be entitled to it.—*Dale v. Hamilton*, 1 Hare's (Eng. Ch.) R. 384; 2 Phil. 266; *Elliott v. Brown*, 3 Swanst. 489; *Forster v. Hale*, 3 Ves. 696.

6. An agreement to sign a written instrument, which the party was prevented from doing by death, has been held sufficient to entitle the other party to a specific performance.—1 Freeman's Ch. R. 65-69.

JAMES H. CAMPBELL, *contra*, made the following points:

1. The memorandum attached as an exhibit to the bill is not a contract, but a mere proposition, which, as it was not accepted at the time, binds neither party. There is no mutuality in it.—*Story on Contracts*, § 380; *Mactier v. Frith*, 6 Wend. 104; *Tucker v. Woods*, 12 Johns. 170; *Payne v. Cave*, 2 Durn. & E. 75; *Gould v. Womack*, 2 Ala. 83; *Ellis v. Burden*, 1 *ib.* 458; 4 Stew. & P. 264; *Casey v. Holmes, Bott & Earle*, 10 *ib.* 777.

2. The contract alleged is so indefinite and uncertain in its provisions, that a specific performance ought to be refused on that ground.—Gould v. Womack, *supra*; Ellis v. Burden, *supra*; Casey v. Holmes, Bott & Earle, *supra*; Boucher v. Buskirk, 2 A. K. Marsh. 346; Goodwin v. Lyon, 4 Port. 297; Blevins v. Bank of Decatur, 6 Ala. 377; Forward v. Armistead, 12 *ib.* 124; Caller v. Vivian, 8 *ib.* 903; 18 *ib.* 353.

3. The evidence is not sufficiently clear and definite to authorize a decree for specific performance.—Aday v. Echols, 18 Ala. 353; Mauldin, Montague & Co. v. Armistead, *ib.* 500; 3 Sumn. 438; 2 Story's Equity, § 764; Lindsay v. Lynch, 2 Sch. & Lef. 1.

4. There is a material and fatal variance between the allegations and proof.—Morgan v. Crabb, 3 Port. 470; Goodwin v. Lyon, 4 *ib.* 306; Duren v. Parsons, 5 *ib.* 345; Maury v. Mason, 8 *ib.* 211; McKinley v. Irvine, 13 Ala. 681; Langdon v. Roane, 6 *ib.* 518; Graham v. Tankersley, 15 *ib.* 634; Gilchrist v. Gilmer, 9 *ib.* 985; Julian v. Reynolds, 11 *ib.* 960; Ansley v. Robinson, 16 *ib.* 793; Paulding v. Lee & Ivey, 20 *ib.* 754; Clements v. Kellogg, 1 *ib.* 330; Gibson v. Carson, *ib.* 421.

5. No part performance is shown sufficient to take the case out of the statute of frauds—2 Story's Equity, § 760; Clinan v. Cooke, 1 Sch. & Lef. 22–40.

6. The insolvency of Sims, and his consequent inability to perform his part of the contract, constitute a sufficient ground for refusing a specific performance.—Blackwilder v. Loveless, 21 Ala. 371; Turner v. Clay, 3 Bibb's R. 53; Tunstal v. Taylor. 1 A. K. Marsh. 43; Johnston's Heirs v. Mitchell's Heirs, *ib.* 227; Abney v. Brownlee. *ib.* 240.

GOLDTHWAITE, J.—The principal object of the present suit is, to enforce the specific performance of an agreement made by the complainant with one McEwen, in his lifetime, in relation to certain real estate in the town of Cahaba. The bill purports to set out this agreement according to its legal effect. The charge is, "that upon the said purchase by the said James A. McEwen of the said lots and improvements, the said McEwen and your orator was to have and own jointly all the estate purchased as aforesaid by the said McEwen

from the said Jackson—that is to say, the said McEwen was to own one half the property, and your orator one half of the said property; your orator to superintend the erection of certain buildings of brick, as mentioned in the deed of mortgage on said lots, to repay to the said McEwen the moneys by him paid out, and the interest thereon, on account of said purchase, and on account of the said buildings, and for all provisions, horses, wagons, and mules furnished by the said McEwen for the benefit of said firm; and your orator to take charge of the same as a hotel, and have one-half of the profits thereof, and one-half of the rents thereof; and the said proceeds to be applied to the payment of said debt.”

The bill concedes that the agreement was a verbal one, and seeks to take it out of the effect of the operation of the statute of frauds, by alleging a partial execution on the part of Sims. But it is entirely unnecessary to consider it with reference to this, as there are other grounds which would prevent a court of equity from enforcing it. We are inclined to the opinion, that the agreement as charged is so vague and uncertain, that a specific performance might well be refused upon that ground. But, if this objection does not apply, and if it be conceded that the testimony fully establishes the agreement as charged; yet, as it is proved that Sims is insolvent, the consequence would be, that if he was allowed to claim the benefit of it, there would be no certainty that his portion of the rents, and his share of the profits of the hotel, which are the only sources to which he could look as the means of furnishing his proportion of the purchase money, or repaying the advances, would be sufficient for those purposes. The purchase money has a long time to run; and if the rents are not sufficient to meet it, (and the evidence shows, it is not probable that it can be realized from that source,) then the deficiency, or at least Sims' proportion of it, must be supplied out of the profits of the hotel business—a business uncertain and precarious in its character. Should this fail, Sims alone could be looked to; and he, as we have seen, is insolvent. Equity uses a sound discretion in enforcing the specific performance of contracts; and it could not, consistently with the principles which regulate its action in this branch of its jurisdiction, require one party to perform, when it was uncertain whether the other



could fulfil the terms of the contract on his part.—Story's Equity, §§ 750, 751.

It must also be remembered, that the partnership in the hotel business was dissolved by the death of McEwen. There was no stipulation that the business should be continued after his death; and whatever doubts there may be as to the right in such case to continue the partnership with his representatives after his death, had there been such a stipulation, in the absence of any such stipulation there can be no doubt that the partnership terminated. Suppose the chancellor had said, Go on, retain possession of the premises, keep up the hotel, apply the rents and profits to the discharge of the purchase money and the reduction of the advances made by McEwen; and after five or six years the debt was not extinguished,—not even reduced, and Sims insolvent. It is no answer to say that such a result would not probably ensue. We cannot say, with any degree of certainty, that it would not, and courts of equity will not enforce contracts from which such consequences might flow.—Story's Eq., § 750.

In relation to the unsigned writing, which, it is charged, embodies the agreement set up by the bill, and which is proved by the evidence: It does not in any respect strengthen the complainant's case. If it is the same contract, the same objections which we have already considered apply to it, and it would be impossible to carry it into effect, so that the other party, or those who represent him, could be sure to have the benefit of what he contracted for.

If, however, the contract established by the evidence varies materially from that charged, (and we incline to the opinion that it does so in the present case.) although a specific performance may, if the terms are such as will admit of it, be decreed at the request of the defendant, who in his answer sets up the agreement as proved, instead of compelling him to resort to a cross-bill, as was the old practice (Story's Eq. Pl. § 391, note 1); yet the same rule applies to the plaintiff as in other cases—he must prove the case the bill makes.—Sugden on Vendors, (7th edit.) 217; Higginson v. Clowes, 15 Ves. 525; Lindsey v. Lynch, 2 Sch. & Lef. 1; Forsyth v. Clark, 3 Wend. 637; Deniston v. Little, 2 Sch. & Lef. 11, n.

It is urged, however, that, although the specific perform-

ance of the contract cannot be decreed, the court should have allowed the complainant compensation for the labor performed by him in the erection of the building. It is to be observed, that neither the writing nor the contract charged provides for any other labor than the superintendence of the work, and for that reason any other services than those stipulated for by the agreement itself could not be taken into consideration in a suit of this character. In other words, there is no principle which would enable him, in a suit upon a contract in equity, to recover for anything outside of it.

But even as to the services performed by Sims in the superintendence of the building, which properly fell within the contract, we do not think he could properly obtain compensation in the present suit. The general rule is, that in suits of this character, compensation is regarded as an incident only, unless there is a special equity which would authorize the court to take hold of the subject-matter and grant relief (Story's Eq. § 799, and cases there cited); and it would seem to be very clear, that equity could not take jurisdiction of a bill, for the sole purpose of assessing damages resulting from a breach of contract. Lord Kenyon went a great way in *Denton v. Stewart*, 1 Cox, 258, in awarding an issue of *quantum damnificatus* on a bill for specific performance, where the enforcement of the contract was impossible from the fact that the defendant had sold the house to another; and it has been followed with doubt and reluctance.—*Todd v. Gee*, 17 Ves. 273. In the first case, however, the defendant had disabled himself *pendente lite* (*Todd v. Gee*, *supra*, note b), so that the court had jurisdiction when the bill was filed. There is, however, no special equity in the present case for the appellant to rest upon. The agreement, not being in writing, may be void at law, so that no action for its breach can be maintained; but services rendered under it can be recovered for, upon the same principle that money paid under it could be recovered.—*Allen v. Booker*, 2 Stew. 21. There being no special equity, and the appellant not being entitled upon his agreement to a specific performance, no relief could be granted.

Decree affirmed, at the costs of the appellant.

## SPOOR vs. PHILLIPS ET AL.

[BILL IN EQUITY BY JUDGMENT CREDITOR TO REDEEM LANDS SOLD UNDER EXECUTION.]

1. *Proof without allegations will not support decree.*—No decree can be rendered which is not founded on an allegation in the bill, notwithstanding there may be ample testimony to justify it.
2. *Rights of purchaser at sheriff's sale.*—The purchaser of land at sheriff's sale under execution, on receiving the sheriff's deed, becomes the absolute owner, and is entitled to the rents and profits on entering into possession; and nothing is left in the former owner, or his judgment creditor, but the naked right to redeem, which must be asserted in the time and manner prescribed by the statute.
3. *Right of redemption how perfected.*—The right to redeem is not perfect, and cannot be enforced in equity, until there has been either a full performance by the plaintiff of all the statutory requisitions, or a valid and sufficient excuse for his non-performance, without any fault or neglect on his own part; and when the bill alleges an excuse for such non-performance, the excuse must be accompanied with an offer in the bill to perform all that the statute requires.
4. *Tender in bill by judgment creditor, when sufficient.*—If the bill does not show that a tender was made before it was filed, a tender made in it is not sufficient to authorize a decree for the redemption, unless, in connection with such offer, the bill also shows a valid and sufficient excuse for the omission to make a tender before it was filed. (Correcting first head-note to Freeman & Warren v. Jordan, 17 Ala. 500.)
5. *Liability of purchaser for rents and profits.*—The liability of the purchaser to account for rents and profits, except "by way of offset to the improvements made," does not arise until he is put in default.
6. *What is not default.*—If no tender is made to the purchaser during his lifetime, he is not in default at his death; and if, upon his dying intestate, a bill to redeem is filed by a judgment creditor against his administrator and minor heirs, a tender in the bill, unless accompanied by the payment of the money into court, does not put the defendants in default, and no decree can be rendered against them for the rents and profits.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. A. J. WALKER.

THIS bill was filed by Charles Spoor, as a judgment creditor of one Lewis J. Davis, against the heirs-at-law and administrator of John Phillips, deceased, to redeem a tract of land, lying in Macon county, which had been sold under execution at law against said Davis, and purchased by said Phillips. The bill was filed in August, 1852, and alleged that the

said sale was made on the 7th July, 1851 ; that the sheriff thereupon executed a deed to said purchaser, who immediately entered into the possession of said land, and continued in possession thereof until his death ; that said Phillips afterwards died, intestate, leaving several children as his heirs-at-law, whose names are specified in the bill, and some of whom are alleged to be minors ; that letters of administration were afterwards duly granted on his estate to one Thomas Phillips, who is made a co-defendant with the said heirs-at-law to the bill. The bill does not allege that any tender was made to the said John Phillips in his lifetime, or to the defendants since his death ; but the complainant offers in his bill "to advance the sum of \$850 on the bid made by the said John Phillips at said execution sale, and tenders the sum bid by said Phillips at said sale, together with such further sum as shall be equal to ten per cent. *per annum* on the purchase money ; and he further offers and agrees to credit said Davis with the further sum of ten per cent. upon the amount bid at the execution sale, and also to comply with all and singular the provisions of the statute in such case made and provided."

On final hearing, the chancellor rendered a decree in favor of the complainant, but he refused to order an inquiry into the rents and profits, and allowed the defendants ten per cent. *per annum* on the amount of the purchaser's bid after the bill was filed ; and these two points are now presented for revision here by the assignments of error.

WILLIAMS & COCKE, for the appellant :

I. As to the first assignment of error, it is insisted,—

1. That the plaintiff below, if a tender or payment had been made, and the statute otherwise complied with, would have been entitled to rents or profits afterwards accruing from the land. But in this case the title descended to minors, who could not convey. It was necessary, therefore, that a bill should be filed ; but it was not necessary that the money should be paid into court.—*Freeman & Warren v. Jordan*, 17 Ala. 500. Besides, the conveyance ought to follow the compliance with the statute, like a sequence its premise ; and the equity of the matter, therefore, is that the creditor shall not be required to part with his money, until the conveyance can so



follow it. The plaintiff filed his bill, and thereby became as much the equitable owner of the land as one who has made a tender; and from that time, therefore, was entitled to rents.

2. The equity of the purchaser is, to have the amount of his bid, with ten per cent. *per annum* thereon; the equity of the creditor is, to have the land, and the rents and profits. But the purchaser dies, and his heirs (being minors) cannot convey, and he is thus compelled to ask the aid of the court; will the court give to the heirs the whole of the purchaser's equity, and allow them also a part of the creditor's?

3. It was not necessary that the statute should expressly give rents as now claimed. The right to them necessarily results from the equitable ownership of the land. The statutory provision as to rents, which includes rents accrued before a tender, has nothing to do with the claim for rents in this case.

4. It was not necessary to make any allegation in the bill about the rents and profits. How could an allegation be made about rents which were yet to accrue? It is a matter of inquiry before the master, and the inquiry is justified by the possession; it matters not whether the land be cleared or uncleared, as the possession itself is deemed profitable in law. A decree relates back to the filing of the bill, like the rescission of a contract for land.—*Paulling v. Watson*, 26 Ala. 205. The vendor is entitled to rents from the filing of his bill, and the purchaser to interest on the money paid from the time of payment.

II. But if the first error be not well assigned, then, it is insisted, the filing of the bill must be held tantamount to a tender; and therefore the chancellor erred in allowing the defendants ten per cent. *per annum* on the purchaser's bid after the bill was filed.—See argument of counsel in *Kennon v. Pillow*, 7 Humph. 283, and opinion of Judge Peck, p. 295.

CLOPTON & LIGON, *contra*:

1. The complainant was not entitled to a decree for the rents and profits. He was not entitled to the possession of the land, until he had put the defendants in default, by a tender of the amount of money required by the statute, and a compliance with its other requisitions. Not being entitled to

the possession, nor to a conveyance of the legal title, upon no principle of law or equity can he ask an account of the rents and profits. The defendants have not yet been put in default: complainant has not paid into court the amount due the defendants, nor has he credited his judgment with the amount proposed in his bill.—Sandford v. Ochdalomi, 23 Ala. 671; Paulling v. Meade, *ib.* 513; Evertson v. Sawyer, 2 Wend. 507.

2. If he is entitled to an account for the rents and profits, he must derive that right from the statute; for his right to redeem at all is given by statute, and he can claim nothing more than the statute gives him. But the statute is entirely silent upon the subject of rents, except to offset the value of improvements which may be claimed.—Clay's Digest, p. 502. And even to offset improvements, the rents can only be valued in cases where the land was sold under mortgage, deed of trust, or decree in chancery; and the provisoes contained in the fifth section do not extend to lands sold under execution.

3. Independent of these reasons, the allegations of the bill are not sufficient to authorize a decree against defendants for the rents. The bill alleges (and its allegations will be construed most strongly against the complainant) that John Phillips was in possession of the land from the sheriff's sale until his death, and that his administrator has been in possession since his death; *non constat* that the land was not unimproved, or that they never received any rents and profits.—Paulling v. Meade, *supra*; Sandford v. Ochdalomi, *supra*. A purchaser of land at sheriff's sale becomes the absolute owner, and a *bona fide* creditor has only the right of redemption.—Kennon v. Pillow, 7 Humph. 291. To hold such purchaser liable for rents and profits, would be to sacrifice real estate, rather than to prevent its sacrifice.

RICE, J.—No decree can be rendered which is not founded on an allegation in the bill, notwithstanding there may be ample testimony to justify it.—Sandford v. Ochdalomi, 23 Ala. 669; Lockard v. Lockard, 16 *ib.* 423.

There are no allegations in the bill in the present case, which would authorize the court to render a decree for rents and profits, or even to consider them for any purpose, except merely "by way of offset to the improvements made."

The purchaser of land of a judgment debtor, at a sale under execution, on receiving the sheriff's deed, becomes the absolute owner, and, entering into possession, is entitled to the rents and profits. Nothing is left in the former owner, or his judgment creditors, but the naked right to redeem; which is lost, if it be not asserted in the time and manner prescribed by the statute, unless, without fault or neglect on the part of the person desiring to redeem, he is prevented or excused from thus asserting it, by the conduct or agreement of such purchaser.—*Kennon v. Pillow*, 7 Humph. Rep. 281; *Simmons v. Marable*, 11 *ib.* 436; *Paulling v. Meade*, 23 Ala. 505.

The right to redeem is not perfect, and cannot be enforced in a court of chancery, until there is either a performance (by the person desiring to redeem) of all that the statute requires of him, or a valid and sufficient excuse for non-performance. And a bill to redeem, which does not *allege* either such a performance, or such excuse for non-performance, and couple such excuse with an offer in the bill to perform all that the statute requires,—contains no equity.—*Rothwell v. Gettys*, 11 Humph. Rep. 135, and cases *supra*; *Southard v. Pope*, 9 B. Monroe, 264; *Griffin v. Coffey*, *ib.* 453.

If the bill does not show that a tender was made before it was filed, a tender made in it is not sufficient to authorize a decree for the redemption, unless, in connection with such offer, the bill shows a valid and sufficient excuse for the omission to make a tender before it was filed. And although the redemption was properly decreed upon the pleadings and proofs in *Freeman & Warren v. Jordan*, 17 Ala. 500, yet the first head-note to that case is not law, and is not authorized by the decision actually made in that case.—See cases cited *supra*.

The title of such purchaser at execution sale, to the land and its rents and profits, as against all persons desiring to redeem, continues perfect and absolute, from the time he goes into possession, *until he is put in default*. His liability to account for rents and profits, except merely "by way of offset to the improvements made," does not arise, until he is in default.

Without undertaking now to specify the various modes in which he may be put in default, it is sufficient for the purposes

of this case, to declare that, as no tender was made to the purchaser of the land mentioned in the bill, in his lifetime, he was not in default at his death ; and that, as the bill shows that he died intestate, leaving *minor heirs*, and that administration was granted on his estate, and fails to show that any tender was made before it was filed, and also fails to show that *the tender therein made was accompanied by the payment of the money into court, no default of the administrator or heirs is alleged*, and there cannot be any decree against them, or either of them, for the rents and profits. Conceding that the bill shows enough to authorize the court to decree a redemption of *the land*, on causing the complainant first to pay the purchase money and ten per cent. interest, and other lawful charges ; yet it does not show enough to entitle him to a decree for rents and profits.

The decree is affirmed.

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### WOODWARD *vs.* DONALLY.

[DETINUE BY INFANT FOR SLAVES SOLD BY HIS GUARDIAN.]

1. *Guardian's power, if unrestrained by statute, over ward's personal estate.*—A guardian has power, if not restrained by statute, to sell his ward's personal estate without an order of court, and his sale will convey a good title to a *bona fide* purchaser ; and therefore, if a guardian, appointed in Tennessee, sells his ward's slave in this State to a *bona fide* purchaser, the infant cannot recover him without making proof of the statute law of Tennessee.

APPEAL from the Circuit Court of Franklin.

Tried before the Hon. THOMAS A. WALKER.

DETINUE by the appellant, an infant who sued by his next friend, to recover a negro woman, named Amanda, and her children, whom he claimed under the will of his grandfather, Joseph Cook, which was duly admitted to probate in Davidson county, Tennessee, in February, 1841 ; while the defendant derived title by purchase for valuable consideration from



one Isaac Rutland, who was regularly appointed plaintiff's guardian in said county of Davidson, Tennessee, and who afterwards brought the slaves to this State, and sold them to the defendant. On the trial, the plaintiff offered in evidence a certified copy of his said grandfather's will, with the probate thereof; also, a certified copy of the statute law of Tennessee regulating the probate of wills; a certified transcript from the records of the County Court of Davidson county, Tennessee, showing the appointment of said Rutland as his guardian; and a copy of his guardian's bond, the condition of which was as follows: "Now, if the said Isaac Rutland shall faithfully execute his guardianship, by securing and improving all the estate of his said ward that shall come to his possession, for the benefit of his said ward, until he shall arrive at full age, or be sooner thereto required, and then render a plain and true account of his guardianship, on oath, before the justice of our said court, and deliver up, pay to, or possess his said ward of all such estate as he ought to be possessed of, or to such other persons as shall be lawfully authorized to receive the same, and the profits arising therefrom, then this obligation to be void," &c. It was also shown, that said Rutland, as plaintiff's guardian, received possession of the negroes now sued for in said county of Davidson; that he afterwards brought them to this State, and sold them to the defendant in Franklin county; that the sale was made to raise money for the purpose of paying plaintiff's expenses at a medical school, and that a portion of the proceeds of sale was thus appropriated. The defendant produced his bill of sale, and admitted his possession, the value of the slaves, &c.

The court charged the jury, "that if they believed from the evidence that said Rutland had possession of the negroes sued for, as guardian of the plaintiff, in the State of Tennessee, as the common law authorized a guardian to sell the personal property of his ward, in the absence of any evidence of the statute laws of Tennessee changing the common law upon the subject, the sale of the negroes to the defendant was valid, although made in the State of Alabama. To this charge the plaintiff excepted, and then asked the court to charge, 1st, that a guardian appointed in Tennessee is not authorized to sell negroes belonging to his ward in Alabama, and the de-

fendant as purchaser from him acquired no title ; and, 2dly, that if the jury believed from the evidence that defendant purchased the negroes, in this State, from one who held possession of them as plaintiff's guardian in the State of Tennessee, and that he sold and executed to defendant a bill of sale for said negroes in his individual name, and not as guardian, then defendant acquired no title by his purchase. Both of these charges were refused by the court on the ground that there was no evidence of the statute law of Tennessee, changing the common law in reference to the power of guardians over the personal property of their wards ; to which refusals the plaintiff excepted." In consequence of these rulings of the court, the plaintiff was forced to take a nonsuit ; which he now moves to set aside, and assigns for error the charge given and the refusals to charge as requested.

JOHN A. NOOE, for the appellant :

1. The common law only recognized guardians of real estate, such as guardians in socage, and guardians in chivalry ; and there were, also, guardians by nature, and for nurture, who had control over the person, but not over the property of minors. As to the personalty, there was no guardian at common law : the king was the universal guardian of all infants, and he afterwards delegated his authority to his lord chancellor ; and hence the jurisdiction of chancery over the persons and property of infants, both in England and the United States, except where it is taken away by statute.—1 Black. Com. 461-62 ; 2 Kent's Com. 218, 226.

2. In most of the States of the Union there are statutes conferring on the Orphans' or County Courts jurisdiction over the estates of minors, and statutory provisions authorizing guardians, under certain circumstances, to sell the property of their wards by order of court. All such statutes are enabling, and not restraining statutes, and tend to show that guardians, independent of statutory regulations, have no right to sell the property of their wards. Rutland was a statutory guardian, appointed in Tennessee ; and the condition of his bond, which was in evidence, required him to keep the property, and to have it ready to deliver to his ward when he arrived at full age. This bond was as strong evidence of his

want of authority to sell, as an express prohibitory statute ; and he was as much bound by his bond, which must be presumed to have been taken in accordance with the statute, as he could have been by a statute.

3. The title to the ward's property is in himself, and not in his guardian ; and hence all actions involving the title must be brought in his own name, and not in the name of his guardian.—Sutherland v. Goff, 5 Port. 508 ; McLeod v. Mason, *ib.* 223. If the title is not in the guardian, how can he convey a good title to another ? A guardian cannot change the nature of his ward's estate, except by some act manifestly for the ward's advantage, or by leave of the court of chancery.—1 Black. Com. 463 (m. p.), note ; Amb. 370 ; 1 Vern. 435 ; 2 P. Wms. 278. That a purchaser from a trustee, who is not authorized to sell personalty, acquires no title by his purchase, see Hester v. Wilkinson, 6 Humph. 215.

WM. COOPER, with whom was R. W. WALKER, *contra*, contended that the sale and appropriation by the guardian, under the circumstances of the case, was proper, and that (whether or not the sale was proper) the guardian could, by the rules of the common law, sell his ward's personal estate, and convey a good title to the purchaser ; and he cited the following authorities : Field v. Schieffelin, 7 Johns. Ch. 154 ; Bank of Virginia v. Craig, 6 Leigh, 399 ; Hopper v. Steele, 18 Ala. 835-37 ; 3 Salk. 177 ; 1 Bla. Com. 463, (note) ; Coke's Inst. 55, 99 ; 1 Parsons on Contracts, p. 114.

CHILTON, C. J.—The question for decision may be thus stated :—If a guardian, duly appointed by the laws of Tennessee, bring personal property of his ward (a slave) to this State, and sell it to a *bona fide* purchaser, can the ward, in the absence of all proof of the statute laws of Tennessee, as respects the power of the guardian to make such sale, treat such sale as a nullity, and recover the property ? The Circuit Court held the sale to be valid—that is, that the purchaser should be protected ; and such is our opinion. We have seen no case which, upon common-law principles, uninfluenced by the statute law, has affirmed a contrary doctrine. On the other hand, the authorities are generally agreed, that the

guardian, if not restrained by statute, may sell the personal estate without an order of court, and the title of the person who purchases in good faith will be protected.

In *Field v. Schieffelin*, 7 Johns. Ch. R. 154, the chancellor (Kent) said,—“Though it be not in the ordinary course of the guardian’s administration to sell the personal property of his ward, yet he has the legal right to do it; for it is entirely under his control and management, and he is not obliged to apply to this court for direction in every particular case.”

In *Inwood v. Twyne*, Amb. 419, Lord Hardwicke held, that guardians and trustees may change the nature of infants’ estates where it is manifestly for the infant’s benefit”; that is, the court will sanction that which it would have ordered.

Chancellor Kent, in his Commentaries, vol. 2, p. 293, edit. of 1850, says,—“He” (the guardian) “may sell the personal estate for the purposes of the trust, without a previous order of the court,”—citing the case in 7th Johns. Ch. Rep., *supra*, and *Ellis v. Essex M. Bridge*, 2 Pick. R. 243; and in a note (b) to same page, the author says: “The sale of personal estate of the infant *cestui que trust*, without a previous order in chancery, if fair, would undoubtedly be good as to the purchaser, but the safer course would be for the guardian to obtain a previous order in chancery.”

So, also, Parsons, in his work on Contracts, p. 114, says,—“He manages and disposes of the personal property at his own discretion, although it is safer for him to obtain the authority of the court for any important measure,” &c.

In *Ellis v. Essex Merrimack Bridge*, 2 Pick. R. 243, it was said—“A title under him, acquired *bona fide* by the purchaser, will be good, for he (the purchaser) cannot know whether the power has been executed with discretion or not.” Perhaps the *dictum* in *Hudson v. Helmes’ Executors*, 23 Ala. 589, as to the power of the guardian at common law over the personal assets of his ward, may not be, strictly speaking, correct. It impliedly concedes, however, that there may be cases where he may sell the personal property, by limiting his agency as not *ordinarily* extending to a sale of such property; and this is sufficient for the present case, as it was not for the purchaser to determine whether or not an extraordinary emergency demanded a sale. He might well have assumed



this, since the guardian was bound to act in good faith, and was liable to his ward on his official bond, if he failed to do his duty.

There is nothing in the condition of the guardian's bond, which forbids his making a sale of the slave, if the law, aside from the bond, did not forbid it. It binds the guardian to a faithful performance of his duties as such—to secure and improve the estate of the ward, to render on oath a true account of his guardianship, and to deliver up, pay to, and put the ward in possession of, “all such estate as he ought to be possessed of,” &c. Now, whether he ought to be possessed of these slaves, depends upon the power of the guardian to make the sale, and the validity of the purchase; which is to be determined by the rules of the common law, no statute having been shown.

We are of opinion, that applying the rules of the common law to personal property in the hands of a guardian, which, being under his control and management, passed by delivery, his sale and delivery of it to a *bona fide* purchaser passed the title, and the purchaser was not bound to see to the application of the purchase money. We need hardly add, that the case before us is clearly distinguishable from the cases reported in our own books, which were governed by the statutes of this State.

There is no error in the record, and the judgment must be affirmed.

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### HOLLEY vs. YOUNGE.

[ACTION ON NOTE GIVEN FOR PURCHASE MONEY OF LAND—QUESTIONS OF PLEADING AND PRACTICE.]

1. *Set-off—what are demands not sounding in damages merely.*—A demand “not sounding in damages merely”, under the statute of set-off (Code, § 2240), is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard; and therefore, under this statute, if a vendee with covenants of warranty buys in an out-

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standing vendor's lien, at a price less than the amount of the purchase money and interest, this demand, if reasonable, would be a good set-off in an action on the note given for the purchase money.

2. *As to plea of pendency of another action.*—The pendency of another action between the same parties is good matter in abatement only, and, when pleaded with pleas in bar, should be stricken out on motion; but if the plaintiff demurs to it, the overruling of his demurrer (even if erroneous) is not an available error, when the record shows that he afterwards recovered judgment on the issues joined.
3. *Covenant cannot be varied by parol.*—The legal effect of a covenant cannot be varied by a parol contemporaneous agreement; as where a vendee, with covenants of warranty, agrees by parol to pay an outstanding incumbrance.
4. *Fraud, when good defence at law against deed.*—The only fraud which can be set up at law to avoid the operation of a sealed instrument, is that which goes to its execution: fraudulent misrepresentations, on the part of the vendee, to the effect that he would not use the deed against his covenantor, are no defence at law.

APPEAL from the Circuit Court of Coffee.

The record does not show the name of the presiding judge.

ACTION (under the Code) by Alfred Holley against Henry A. Younge, on a promissory note for \$1,000, executed by the defendant, dated September 23, 1851, payable to the plaintiff or bearer on or before the 1st January, 1851. The defendant pleaded, 1st, *non assumpsit*; 3d, payment; 4th set-off; 5th, pendency of another action, commenced prior to this suit, between the same parties, and for the same subject-matter; and the second plea was as follows: "That defendant made the note sued on for lands, and obtained deed from plaintiff with covenants of warranty against all incumbrances; that at the time of the purchase and execution of said deed, the original purchase money due for said lands was unpaid, and afterwards the vendor filed his bill in chancery in this district, against said plaintiff, and obtained a decree condemning said lands to the lien of the vendor for said unpaid purchase money; that said lands were sold under said decree by the register in chancery, and defendant became the purchaser, at about \$300; that said plaintiff was a party to the said proceedings in chancery, condemning said lands as aforesaid; that defendant has paid the \$300, and had paid the same prior to the commencement of this action."

The plaintiff joined issue on the first, third, and fourth pleas, and demurred to the second and fifth. The grounds

of demurrer specified to the second plea were, "that it does not set up a legal defence to plaintiff's action, or any part of it; that said plea offers to set off against plaintiff's note an action sounding in damages merely; and that said plea sets up no request by the plaintiff to the defendant to pay said \$300." And the grounds of demurrer to the fifth plea were, "that it sets up matter in bar of plaintiff's action, which could only be pleaded in abatement of the same; that it is a plea in abatement, put in after the defendant had pleaded in bar; that it is a plea in abatement, pleaded with pleas in bar; and that the matters set up in said plea are insufficient to bar plaintiff's action."

The court overruled both these demurrers, and the plaintiff then filed two replications to the second plea, which were as follows: "1st, That said defendant, at the time of the execution of said deed, in said plea mentioned, agreed with plaintiff to pay said incumbrance in said plea mentioned, and that he would not hold plaintiff responsible for said incumbrance in consequence of the low price he was to pay for said land, and said defendant was to take said land, subject to said incumbrance, for the original purchase money claimed by plaintiff in his said complaint"; and, 2d, "That said deed of warranty mentioned in said plea was obtained by defendant from plaintiff, by his fraudulently representing to plaintiff that said deed should never be used against him, *but was executed solely for the purpose of getting the Rimmies out of possession of said land*, when, in fact, defendant is using said deed in this suit, against plaintiff, contrary to his said representations."

The defendant demurred to these replications, "upon the ground that they are contradictory of said deed, and are not alleged to be in writing; "because the facts in said replications do not amount to a defence in law to said matters specially pleaded; and because the same is no answer to said plea." The court sustained the demurrer, and the plaintiff then took issue on said pleas; and on the trial he recovered a verdict and judgment for \$839 77, from which he prosecutes this appeal, and here assigns for error the rulings of the court on the several demurrers, as above stated.

WATTS, JUDGE & JACKSON, for the appellant.

JAMES L. PUGH, *contra*.

GOLDTHWAITE, J.—The second plea avers, in effect, that the note sued on was given for a tract of land, to the plaintiff below, who executed a deed with covenants of warranty against incumbrances; that at the time of the execution of said deed, there was a vendor's lien on the land for the purchase money; that a bill in chancery was filed, to which the plaintiff was a party, to enforce said lien, a decree rendered condemning the lands to be sold to the satisfaction of the same, which was done, and that the defendant became the purchaser for the sum of three hundred dollars.

Under our decisions, based upon the old law, the demand set up in this plea would not have been a good set-off, for the reason, that the contract out of which it arose was one of unliquidated damages (*Dunn v. White*, 1 Ala. 645; *Cole v. Justice*, 8 Ala. 793); but the law in this respect has been changed by the Code (section 2240), which allows "unliquidated demands, not sounding in damages merely", when subsisting between the parties at the time of suit brought, to be set off. What we understand by a demand "not sounding in damages merely," is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard; but where, as in case of a breach of a marriage contract, an assault and battery, or other cases of the like nature, the demand is of a character which, under the rules of law, does not admit of a reduction to a certain money standard, there it sounds in damages merely. Applying this rule to the plea, as the breach of warranty against incumbrances entitles the vendee to extinguish any one which may be outstanding, in order to perfect his title, (*Cole v. Justice*, *supra*,) and if he has bought it in, to recover the amount paid if reasonable (*Knox v. Anderson*, 20 Ala. 156), and it does not exceed the amount of the purchase money and interest, it follows that in such a case the demand would be a good set-off. The plea is very carelessly drawn, but, upon a fair construction, it means what we have stated; and the only grounds of objection taken by the demurrer,—and we are not to consider any other, (Code,



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§ 2253,) are, that the plea does not set up a legal defence to the action,—that the demand which it offers to set off sounds in damages merely, and that it states no request by the plaintiff to the defendant to pay the three hundred dollars ; none of which can be sustained.

The fifth plea averred the pendency of another action for the same cause, between the same parties, and was matter pleadable only in abatement.—1 Saund. Pl. (5 Am. edit.) 20. The proper course, when a plea in abatement is pleaded with a plea in bar, is to strike it out on motion.—Hart v. Turk, 15 Ala. 675. But, if it could have been taken advantage of by demurrer, the error of the court in overruling it will not avail the appellant, as the record shows that the action was not abated, but a judgment rendered in his favor, which could not have been the case had he not succeeded on that plea ; and he therefore cannot have sustained any injury by the action of the court upon the demurrer.

The demurrers to the replication to the second plea were also properly sustained. The first sets up a parol contemporaneous agreement destroying the legal effect of the covenant, which is not allowable (Holt v. Moore, 5 Ala. 521 ; Litchfield v. Falconer, 2 Ala. 280) ; and the second alleges that the deed was obtained by the fraudulent misrepresentations of the other party that he would not use it against the covenantor. The only fraud which can be set up in a court of law to avoid the operation of a sealed instrument, is that which goes to its execution (Cow. & Hill's Notes to Ph. Ev. 1449 ; Morris v. Harvey, 4 Ala. 300) ; as where there is a fraudulent misreading, or obtaining such an instrument as the obligor did not intend to give.—Franchot v. Leach, 5 Cowen, 506. The fraud alleged, not affecting the execution, was no defence.

Judgment affirmed.

## BRYAN ET AL. vs. WILSON.

[ACTION ON PROMISSORY NOTE BY PAYEE AGAINST MAKERS.]

1. *Pleading to amended complaint, without objection, waives error in its allowance.*—After a demurrer has been sustained to the original complaint, and leave given to the plaintiff to amend, if the defendant pleads to the amended or substituted complaint, without objecting to the leave to amend, or to the amendment itself, he thereby waives his right to revise on error the action of the court in allowing it.
2. *That plaintiff is not the party really interested in the note, good plea under Code.*—A plea in bar by the makers of a promissory note, in a suit brought by the payee, that the plaintiff was not the party really interested in the note, was held bad on demurrer under the practice existing before the adoption of the Code, because the action was then required to be brought in the name of the party having the legal interest; but such a plea is now good under the Code, which requires (§ 2129) the suit to be prosecuted “in the name of the party really interested, whether he have the legal title or not.”
3. *Agent may sue in his own name, on note given for money of principal lent by him without authority, and payable to himself as agent.*—If an agent lends the money of his principal without authority, and takes a promissory note for it payable to himself as agent, he may maintain an action on the note in his own name, unless it is shown that he has been in some way discharged from the liability thus incurred.
4. *Special plea of non est factum must be verified by affidavit.*—A special plea, averring facts which amount to nothing more than a denial of the execution of the note sued on in such a manner as to make it binding on the defendants, is bad on demurrer unless verified by affidavit.
5. *Plea which does not go as far as it professes is bad on demurrer.*—In a suit against three, two of the defendants filed a special plea, commencing, “And the said D. and S., for separate plea in this behalf, by leave of the court pleaded, say *actio non*, because they say,” &c., and concluding,—“and so the said D. and S. say, that as to them, the said note is void,” &c.: *Held*, that the plea was bad on demurrer, because it professed to answer the action, and to constitute a bar as to all the defendants, while it was good only as to two of them.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. EDMUND W. PETTUS.

ACTION (under the Code) on a promissory note for \$325, executed by Jesse W. Bryan, William H. Davis, and John M. Sprowl, dated January 2, 1854, and payable to “Benjamin F. Wilson, noble-grand of Porter Lodge No. 16, I. O. O.

F.", on the first day of January, 1855. The summons and original complaint were in the name of "Tandy P. Duncan, noble-grand of Porter Lodge No. 16, of the Independent Order of Odd Fellows, in Carrollton, Alabama", who was alleged to be the successor in said office of said Benjamin F. Wilson; but a demurrer being sustained to said original complaint, and leave given to the plaintiff to amend his complaint, a new complaint was filed in the name of said Wilson.

The defendants pleaded seven pleas, of which the first was the general issue, and the others were as follows:—

"2. That plaintiff is not the party really interested in said note mentioned in said complaint; and this they are ready to verify," &c.

"3. That said note was given for money belonging to the widows and orphans' fund of Porter Lodge No. 16, of the Independent Order of Odd Fellows, which money was lent by the noble-grand of said lodge to said defendant Jesse W. Bryan, without authority so to do, and contrary to the constitution and by-laws of said lodge; and this they are ready to verify," &c.

"4. That said Jesse W. Bryan was indebted to the widows and orphans' fund of said lodge, in said county, by note for the sum of \$200; that said lodge authorized its secretary to take a new note for said debt, upon the payment of the interest thereon by said Bryan; that said secretary, without any authority, included in said note the further sum of \$125, which the said Bryan, as treasurer of said lodge, was indebted thereto, on account of said fund; that by the constitution and by-laws of said lodge, of force at the time, the said secretary was not authorized to take a new note for said \$200, and at the time said note sued on was taken, said widows and orphans' fund was under the exclusive control and management of a committee, appointed by said lodge, who alone were authorized to lend said fund, and to take a new note therefor; and that said committee never received, nor authorized the receipt of, either of said notes, and never lent the money for which either was given; and this they are ready to verify," &c.

"5. That said note was given for a debt, or debts, due from said Jesse W. Bryan to said lodge, under a resolution of said lodge, authorizing its secretary to receive the same, subject to

the future action and approbation of said lodge; that said note was never delivered to, nor accepted by said lodge, nor was the receiving of the same by said secretary ever approved by said lodge, nor was there ever any action of said lodge, receiving said note, or accepting the same; and this they are ready to verify," &c.

"6. That said Jesse W. Bryan was indebted to said lodge, by note for the sum of \$200, and as treasurer of said lodge in the sum of \$125, upon his bond as such treasurer to said lodge; that said lodge passed a resolution, authorizing its secretary to extend said debt of \$200, if the said Bryan would pay the interest thereon, and give a new note with security, which new note was to be subject to the future action and approval of said lodge; that the note sued on was given to extend said debt of \$200, and said secretary included in it said sum of \$125, without any authority so to do, which note, after being signed by said defendants, was delivered by said Bryan to said secretary; that said note has never been delivered by said defendants, nor by said secretary, to said lodge, nor has said lodge ever accepted or had possession thereof, nor approved the same or the taking thereof; that said note of \$200 against said Bryan is still held by said lodge, unsatisfied and uncanceled; that the liability of said Bryan, upon his said bond as treasurer of said lodge, for said sum of \$125, still remains, and is unsatisfied and undischarged; and that this action was not commenced by authority of said lodge; and this they are ready to verify," &c.

"7. And said defendants Wm. H. Davis and John M. Sprowl, for separate plea in this behalf, by leave of the court pleaded, say *actio non*, because they say that said Jesse W. Bryan, before the making of said note mentioned in said complaint, was indebted to said lodge in the sum of \$325; that said note was given for said debt of said Bryan, but does not express that such was the consideration thereof; and so the said Davis and Sprowl say, that said note, as to them, is void by the statute of frauds; and this they are ready to verify," &c.

The plaintiff demurred to all these special pleas, and assigned the following grounds of demurrer to each:—

To the second plea,—“1st, because it does not allege or state any fact, nor aver that said note has been transferred,



nor aver to whom said note belongs, or who has an interest therein; and, 2d, because said plea, in fact, is a plea in abatement, and is not sworn to."

To the third plea,—“1st, because said plea is no answer to the complaint; 2d, because it is immaterial to whom said money belonged, or whether it was loaned by the plaintiff with or without the authority of said lodge; 3d, because there is no averment that said lodge had any corporate existence, or that said lodge had any authority to adopt a constitution or by-laws.”

To the fourth plea,—“1st, because there is no averment in said plea that said lodge has any corporate existence; and, 2d, because there is no averment that said lodge, or the committee under whose control said widows and orphans' fund is alleged to be, refused to accept the same, or dissented from the action of the secretary in that behalf.”

To the fifth plea,—“1st, because there is no averment in said plea that said lodge ever disapproved the action of said secretary in taking and receiving said note; 2d, because there is no averment that said secretary did not hold the note as the agent of said lodge, or that said lodge ever in any way dissented from the action of said secretary in that behalf.”

To the sixth plea,—“1st, because there is no averment that the secretary in any way accepted (*exceeded*?) his authority in taking said note sued on; 2d, because there is no averment that said lodge in any way dissented from, or disapproved of, the action of its secretary in that behalf; 3d, because there is no averment that said secretary is not the agent of said lodge to hold said note; and, 4th, because there is no averment that said lodge claims or seeks to enforce the liability of said Jesse W. Bryan, either on said note for \$200, or on his bond as treasurer.”

To the seventh plea,—“1st, because there is no averment that there was not any new consideration for said note; and, 2d, because there is no averment that the time of payment was not extended.”

The court sustained all the demurrers, and thereupon the defendants withdrew their first plea, and refused to plead over; and judgment was accordingly rendered for the plaintiff.

The errors now assigned are, 1st, in allowing the complaint

to be amended by striking out the name of Duncan and inserting the name of Wilson ; and, 2d, in sustaining the demurrers to the several pleas respectively.

**TURNER REAVIS**, for the appellants :

1. The case of *Leaird v. Moore*, decided at the present term, settles beyond question that the court committed an error, in allowing Duncan's name to be struck out as plaintiff, and Wilson's to be substituted. In that case exception was taken to the allowance of the amendment, but in this none was taken. The fact, however, that no exception was taken, cannot make a difference between the two cases ; for it is a rule, that whenever the court acts against a party, *in invitum*, and the record shows that the court erred in doing so, no exception is necessary to enable the party injured to insist upon the error in this court.—*Carter v. Pickard*, 11 Ala. 673. In this case the court gave leave to amend, as part of the judgment on the demurrer, without being asked for leave. No exception to this erroneous judgment was necessary, according to the case cited ; and no exception being necessary, pleading to the amended complaint can no more cure the error than it did in the case of *Leaird v. Moore*. *Allen v. Harper*, 26 Ala. 686, is not like this case. In that case, there was a trial and verdict, without objection to the want of a declaration. The court did not, *mero motu*, act against the party, as it did in this case.

2. The second plea was a good plea in bar. No one but the party really interested had a right to sue on the note.—Code, § 2129. Under the general issue, at common law, the defendant had a right to show, that the plaintiff had no right to maintain the action.—*Bryant v. Owen*, 2 Stew. & Port. 134 ; 1 Saund. on Pl. & Ev. 142, 152 and 153, top pages. Under section 2237 of the Code, the defendant may plead specially any matter of defence. The case of *Agee v. Medlock*, 25 Ala. 281, was upon an *endorsed* note, and was decided without reference to the provisions of the Code, above cited. This action is not upon an endorsed note.

3. The third plea is good, as a plea of want of consideration. For, if the noble-grand had no authority to lend the money, the defendants were liable for it to the party to whom

it belonged ; and a recovery by the plaintiff, and a satisfaction of the judgment by the defendants, would not relieve them from the liability.—Hunter v. Field, 20 Ohio R. 340 ; Sowles v. Sowles, 10 Verm. 181 ; Bryan v. Philpot, 3 Ired. 467.

4. The fourth plea is good for the same reason ; and for the further reason, that as the secretary had no authority to include the \$125 in the note, there was a want of consideration as to that amount.

5. The fifth plea is good, because, until the lodge approved or accepted the note, the debt against Bryan still subsisted, and, consequently, there was no consideration for it, until such acceptance or approval. Indeed, the note could have no binding validity at all, until the lodge accepted it.—Crops v. Bealle, 5 Eng. Law & Eq. Rep. 408 ; Capps v. Smith, 3 Scam. 177 ; Denniston v. Bacon, 10 Johns. R. 198.

6. The sixth plea is good, as a plea of want of consideration. The note being given to extend Bryan's debt to the lodge, subject to the approval of the lodge, had no validity until it should be accepted by the lodge, and Bryan's debt canceled. If the consideration is sufficient as to the \$200, it is not as to the \$125. Consequently, the plea is good as a plea of partial want, or failure of consideration. If Bryan's debts to the lodge are still held against him, and the cancellation or extension of these debts be the intended consideration of the note, then there is no consideration at all,—especially as the note has never been accepted, nor acted upon, nor approved by the lodge, in accordance with its own resolution. There can be no doubt that the sixth plea presents a good bar to the action.—See the authorities previously cited.

7. The seventh plea is also good, under the new statute of frauds.—Code, § 1551.

S. F. HALE, *contra* :

1. Pleading to the amended complaint, without saving any objection to its allowance, was a waiver of the irregularity, and the point cannot be raised here for the first time.—Allen v. Harper, 26 Ala. 689 ; Henley v. Branch Bank at Mobile, 16 *ib.* 557 ; Bancroft v. Stanton, 7 *ib.* 351.

2. The second plea was bad on demurrer.—Agee & Agee v. Medlock, 25 Ala. 283.

3. The third, fourth, fifth, and sixth pleas were all defective for the causes assigned in the demurrers. None of them show a failure of the consideration of the note sued on.

4. The seventh plea does not present a case within the statute of frauds.—Code, § 1551.

RICE, J.—The right of the appellants to revise the action of the court below, in allowing the amendment of the complaint, was waived by their filing pleas to the amended complaint, without making any objection to the leave to amend, or to the amendment itself. Such points cannot be raised for the first time in this court, but must be made in the primary court, and presented by exception duly taken; as was done in *Leaird v. Moore*, decided at the present term.

Until the Code went into effect, the general rule was observed, that an action for the breach of a contract must be brought in the name of the person having the *legal* interest in it.—*Fortune v. Brazier*, 10 Ala. 791.

But section 2129 of the Code provides, that “Every action founded upon a promissory note, bond, or other contract, express or implied, *for the payment of money*, must be prosecuted in the name of the party *really* interested, whether he have the legal title or not,” &c.

Before the Code took effect, a plea by the makers of a promissory note, in a suit thereon by *the payee*, that “the plaintiff is not the party really interested in said note”, would have been held bad on demurrer.—*Bancroft v. Paine*, 15 Ala. 834. But under the section of the Code above cited, we are constrained to hold that such a plea is good in bar, even in a suit brought in the name of *the payee* of a promissory note.

We deem it just to say, that when the payee takes issue on such plea, the mere introduction of the note as evidence will make out a *prima facie* case for him; for where a note is payable to the plaintiff, it is an admission that he is entitled to receive the amount thereof.—*Grigsby v. Nance*, 3 Ala. 347.

An agent may have a special interest or property in a promissory note given to him for money of his principal, which he has lent without authority; and whenever he has such interest or property in such note, he may sue upon it.—*Tompkies v. Reynolds*, 17 Ala. 109.



The general rule, that an agent shall not sue on contracts made by him in the name and on the behalf of his principal, is admitted. But there are several classes of cases, where the agent acquires personal rights, and may maintain an action upon the contract in his own name, without any distinction, whether his principal is, or is not, entitled also to similar rights and remedies on the same contract. One of these classes is, where the promise is in writing, and made to the agent by *name*, as well as description of office. Another class is, where the agent has made a contract, in the subject-matter of which he has a special interest or property, whether he professed at the time to be acting for himself or not.—Story on Agency, § 393; *Fortune v. Brazier*, 10 Ala. 791; *Bancroft v. Paine*, 15 *ib.* 834; *Nabors v. Shippey*, 15 *ib.* 293.

In *Tompkies v. Reynolds*, 17 Ala. 109, it was held, that if an executor or administrator lends the money or chuses in action of the estate, *without authority to do so*, it is a conversion for which he becomes personally liable, and he may in such case sue on the written contract in his own name, notwithstanding he has resigned or been removed from the administration, unless it be shown that he has *in some way been discharged from the liability thus incurred*. It was further held, that those representing the estate had the right (if they elected so to do) to interpose, in a proper manner, to arrest the payment to the removed executor, and claim the contract as a portion of the estate.

In *Sorrelle v. Elmes*, 6 Ala. 706, it was held, that pleas which amount to nothing more than a denial of an execution of the note sued on, *in such a manner as to be binding on the defendant*, are bad, unless they are verified by the affidavit required by the statute.

The pleas in this case are not verified by any affidavit. There is no averment in any of them, that the plaintiff has been discharged from the liability which he may have incurred in consequence of acting without authority, as alleged in some of the pleas. It is not shown or averred that his action has been repudiated by the lodge, or that his authority has been revoked by it, or that it has refused to approve of his conduct in taking the note sued on. It is not averred in the third, fourth, fifth, sixth or seventh plea, that the plaintiff has no interest in the note.

We think the *principles* on which the cases of Tomkies v. Reynolds and Sorrelle v. Elmes, above cited, were decided, may well be applied to the present case; and that under the application of these principles, the third, fourth, fifth and sixth pleas are bad.—Fletcher v. Edson, 8 Vermont R. 294.

The seventh plea is bad, because it does not constitute a defence to the extent to which it professes to go. It professes and undertakes to answer *the action*, and to constitute a bar as to *all the defendants*; but in truth it makes no answer as to one of the defendants.—Deshler v. Hodges, 3 Ala. 509.

We do not wish to be understood as deciding that there is no other valid objection to the third, fourth, fifth, sixth and seventh pleas, than we have above specified. Without examining any other objections to them than those above shown, we decide that they are bad, and that the court below did not err in sustaining the demurrers to them.

For the error in sustaining the demurrer to the second plea, the judgment is reversed, and the cause remanded.

## HISCOX vs. HENDREE.

[ASSUMPSIT ON PROMISSORY NOTE BY ENDORSEE AGAINST MAKER—POINTS OF PRACTICE CONCERNING EVIDENCE.]

1. *Provisions of Code affecting testimony do not apply to causes pending when it took effect.*—The effect of the exception contained in section 12 is, to exempt causes pending when the Code went into operation—to-wit, January 17, 1853—from the operation of its provisions affecting testimony; therefore, in such a case, the transferee of the instrument sued on, though declared by section 2290 an incompetent witness for his transferree, may still be rendered competent by a release.
2. *When interested witness cannot prove his own release.*—If the interest of a witness appears on the face of the note in suit, and objection to his competency on that ground is made before filing cross-interrogatories, he is incompetent to prove his own release.
3. *Motion to admit or exclude evidence, of which part is legal and part illegal, may be either sustained or overruled.*—Plaintiff having offered a deposition in evidence defendant moved to exclude the answer to the third interrogatory, which

contained some legal and some illegal evidence ; “ and thereupon the court excluded all and every part of said evidence from the jury, and plaintiff excepted” : *Held*, that the action of the court was not erroneous.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

ASSUMPSIT by William H. Hiscox against John Hendree, on two promissory notes, each for \$325, dated January 1st, 1851, payable six and twelve months after date to the order of G. D. Hiscox, and by him endorsed to plaintiff. On the trial, after the plaintiff had read his notes in evidence, the defendant introduced evidence tending to show that said notes were given in part payment of a philosophical apparatus for which he had contracted with said G. D. Hiscox by letter at the price of \$1300 ; that the balance of the purchase money was paid in cash ; and that the apparatus was not worth more than the amount of said cash payment. The plaintiff then offered in evidence the deposition of said G. D. Hiscox, which had been taken on interrogatories and cross-interrogatories ; and it appeared that the defendant, at the time of filing his cross-interrogatories, objected to the examination of the witness for plaintiff, on the ground that he was interested in the event of the suit, and gave written notice that he would move to suppress his deposition at the trial for this reason. The defendant now objected to the reading of the deposition on that ground ; and the plaintiff thereupon offered to show that the witness was released from all liability upon said notes before he was sworn, and for this purpose read to the court the answer of the witness to the second interrogatory, in which he stated that he had been released by the plaintiff, and appended the release as an exhibit to his answer. “ After the reading of said release to the court, the plaintiff again offered to read said testimony to the jury ; which was objected to by the defendant ; and the court excluded said testimony from the jury, and all and every part of it, and the plaintiff excepted.

“ The plaintiff then offered to read the testimony of James R. Chilton, which testimony was taken on interrogatories in the city of New York.” This witness, in answer to the third interrogatory, describes the apparatus sold by said G. D.

Hiscox to the defendant, and states what Hiscox told him was the price of it. "The defendant moved to exclude the answer of said witness to the third interrogatory ; and thereupon the court excluded all and every part of said testimony from the jury, and plaintiff excepted."

These two rulings of the court are now assigned for error.

WM. M. BYRD, for the appellant :

I. The deposition of Hiscox ought not to have been ruled out. This action was commenced before the Code went into operation, and therefore, by force of section 12, it is not affected by section 2290. The question of the competency of this witness, therefore, must be tested by the rules of the common law. In a suit by the endorsee of a promissory note against the maker, the payee and endorser was a competent witness to impeach the consideration, and he should therefore be competent to sustain it.—*State Bank v. Seawell*, 18 Ala. 616. But, admitting that, at common law, he was incompetent for this purpose by reason of interest; yet, in this case, he had been released, and this was sufficiently shown to have authorized the admission of his deposition, because,—

1. The defendant examined him as to the release, and is not allowed, after doing so, to object to his competency to prove it.

2. For the further reason, that the only evidence of the identity of the witness with the payee, was his own deposition; and if he was competent to prove that fact, he was also competent to prove his release.

3. For the further reason, that the witness, being released as to one of the notes by the failure of the plaintiff to sue to the first court, was, to the extent of the amount of that note, competent to prove the consideration.

4. The original release was appended to the deposition, and certified by the commissioner. The plaintiff had the deposition of the witness regularly taken, and offered the release as his own act on the trial; which was sufficient to estop him from afterwards denying it. These facts are sufficient to raise a legal presumption of the execution of the release before the taking of the deposition.—2 Story's R. 16, 42; 8



Term R. 303 ; 10 Johns. 381 ; 9 C. & P. 235 ; 8 Shep. 494 ; 13 Conn. 319 ; 1 Greenl. 536 ; 22 Ala. 269.

5. The defendant allowed the evidence of the witness as to the release, and also the release, to be read without objection ; and if these were sufficient to remove the objection to the competency of the witness, the deposition ought not to have been excluded.

6. All that is necessary to be done, in such a case, is to furnish the court with sufficient evidence to raise a legal presumption of the genuineness of the release ; and this was done. The court, therefore, should not have excluded the deposition.—1 Greenl. Ev. §§ 423, 425 ; Herndon v. Givens, 16 Ala. 261 ; Carlisle v. Russell, 1 C. & P. 234 ; *ib.* 197 ; Dent v. Portwood, 17 Ala. 242.

II. The court erred, also, in excluding "*all and every part of*" the testimony of Chilton—that is, not only the answer to the third interrogatory, but the entire deposition, and every part of it ; thereby, in effect, passing upon every part of it in advance, and anticipating any offer on the part of the plaintiff of a portion of it only. To have offered any portion of the deposition, after "every part" of it had been thus excluded, would have been a violation of the courtesy which is due from the bar to the court, if not a contempt of court. By failing to object to any other portion of the testimony, the defendant conceded its admissibility ; and therefore the court erred in excluding it.—Bartol v. Calvert, 21 Ala. 46. Many decisions of this court hold, that the court below ruled properly, in not sustaining an objection when a part of the evidence was admissible.—Rowland v. Ladiga, 21 Ala. 31 ; Litchfield v. Falconer, 2 *ib.* 280 ; Hatchett v. Gibson, 13 *ib.* 597 ; Melton v. Troutman, 15 *ib.* 535 ; Allen v. Smith, 22 *ib.* 416 ; Newton v. Jackson, 23 *ib.* 335. But no one of these cases decides, that it is a matter in the discretion of the court to exclude the whole or "every part" of the testimony. The dictum, therefore, in Gibson v. Hatchett & Bro., 24 Ala. 201, cannot be sustained. The true distinction seems to be this : If testimony is offered, of which a part only is admissible, and a general objection is made to its admission, the court may either overrule the objection, or it may sift the evidence and exclude the illegal part ; and this is within the discretion of

the court, and will not be reviewed on error. But, on the other hand, this rule certainly does not authorize the court to exclude "every part" of the testimony offered, when an objection is only made to an answer to one interrogatory.

WM. M. MURPHY, *contra*, contended, 1st, that the deposition of Hiscox was properly excluded under the authority of *Dent v. Portwood*, 17 Ala. 242; and, 2d, that the testimony of the witness Chilton was correctly suppressed, because a part of it was illegal, while the whole deposition was offered together.

CHILTON, C. J.—1. If the rules prescribed by the Code, as affecting the testimony in causes, are to be applied to cases which were pending before the 17th January, 1853, when the Code went into operation, then it is clear, that by section 2290, G. D. Hiscox, the transferrer of the note sued on, is not a competent witness for the transferee, to sustain the cause of action; the matter in controversy exceeding three hundred dollars.—See section 2313.

But section 12 expressly declares, that "No action, or proceeding, commenced before the adoption of this Code, is affected by its provisions." When the action was brought, G. D. Hiscox, upon being released by the plaintiff, the transferee of the demand sued for, was a competent witness; and, to allow the provisions of the Code to disqualify him, might very seriously affect the plaintiff's right of recovery, nay, prevent his recovery. We think, the only safe rule by which to be governed, is, to make the exception contained in the 12th section of the Code general, and to hold that actions commenced before the adoption of the Code are to be governed by the old law, and those commenced since by the law as prescribed by the Code. Of course, this is confined to proceedings had in the court in reference to particular causes, and not to such as relate to the organization of the court for the trial of causes indiscriminately. This was the evident meaning of the legislature, and furnishes a plain and simple rule, easy of application, and one which cannot be well mistaken; whereas, to depart from it, and make portions of the Code apply to such proceedings, and exempt other portions,

would lead to great confusion and embarrassment, as well as give rise to much litigation consequent upon the uncertainty which would be introduced.

2. It appears upon the face of the papers sued on, that G. D. Hiscox is the endorser, through whom the plaintiff derives his title, and he is *prima facie* an interested witness. When interrogatories were filed by the plaintiff to take his deposition, the defendant's counsel promptly objected to his examination, on the ground of his interest, and examined him on cross-interrogatories, subject to that objection; and a notice was then filed that he should move to suppress the deposition, for that reason, on the hearing of the cause. The plaintiff then proceeded to propound a question to him, to prove his interest, and that he was released. The witness testified to his interest formerly; but stated that the plaintiff had released him, and that he then had no interest. He produced what he called the release, which exempts him from all liability on two notes of three hundred and twenty-five dollars each, payable by J. Hendree, Selma, Ala., six and twelve months after date. The interest of the witness appearing, and being duly presented by the objection on the part of the counsel for the defendant, the witness was no more competent to disprove his interest, or to prove his release, than any other fact in the case. The case of *Dent v. Portwood*, 17 Ala. 242, shows very clearly that the court properly excluded the testimony.

3. As respects the testimony of James R. Chilton: It was taken by deposition, and the bill of exceptions says the plaintiff offered to read it to the jury. The defendant objected to the answer to the third interrogatory, a part of which is legal and a part illegal; "thereupon the court excluded all and every part of said testimony from the jury." My brethren are of opinion, that the plaintiff must be regarded as offering the whole of Chilton's deposition, and a portion of it being illegal, the court might properly have rejected it as a whole, and thus have cast on the plaintiff the duty of sifting the proof, and separating the legal portions from the illegal; and so they hold, that whether the exclusion of the court, as stated in the bill of exceptions, extended to the whole deposition, or only to the answer of the witness to the third interrogatory, which

also included some illegal testimony, it was proper, since the court, being justified in excluding the whole, cannot be put in error by the exclusion of a part. For my own part, I think the record shows that the court acted upon *the motion of the defendant*, which went to the answer to the third interrogatory, which motion raised no objection to other portions of the testimony; and as the deposition consisted of several distinct portions, I do not think it the correct practice for the court, upon an objection to an isolated portion, to group the whole and exclude the whole. As, however, this involves a mere matter of practice, I yield to the opinion of the majority.

Judgment affirmed.

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### DAVID vs. DAVID.

[BILL FOR DIVORCE BY WIFE ON THE GROUND OF CRUELTY.]

1. *Acts of cruelty proved but not alleged no ground for decree.*—Specific acts of cruelty which are established by the evidence, but not charged in the bill, cannot be made the foundation for a decree, although the court may well consider and give weight to them as tending to explain and corroborate other acts specifically alleged in the bill.
2. *Substance of charge only need be proved.*—The particular act of violence charged in the bill must be substantially proved, but it is not necessary that all the non-essential circumstances attending it should be proved precisely as alleged; thus, where the wife charged in her bill that her husband struck her several times with a stick, choked her down, and drew his knife and threatened to cut her throat, while the evidence was that he choked her, struck her with a whip, and pulled her hair—held no material variance.
3. *What is cruelty on the part of husband.*—Cruelty, where it does not affect life, limb, or health, is frequently a relative term, whose meaning must be determined by the particular circumstances of each case: between persons of education, refinement, and delicacy, the slightest blow in anger might be cruelty, while between persons of a different character and walk in life, it might not mar to any great extent their conjugal relations, nor materially interfere with their happiness.
4. *How affected by provocation on part of wife.*—If the evidence shows that the wife, by her own misconduct, has brought upon herself the ill-treatment of which she complains, and which is not wholly disproportioned to the provocation,



## David v. David.

she is required to make out a much stronger case for relief than when her own conduct has been entirely blameless; and on this ground a divorce was refused in this case.

5. *Costs*.—The bill having been dismissed, and a divorce refused, on the ground that both parties were in fault, the costs were equally divided.

APPEAL from the Chancery Court at Wetumpka.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Mrs. Milly David against her husband, Henry P. David, seeking a divorce on the ground of cruel and inhuman treatment. The chancellor granted the divorce, and his decree is now assigned for error.

ELMORE & YANCEY, for the appellant.

NAT. HARRIS, *contra*.

GOLDTHWAITE, J.—This was a suit brought by Mrs. David against her husband to obtain a divorce, on the ground of cruel treatment. The bill contains several specific allegations of cruel treatment, commencing in 1844, and continuing into 1847, when she separated from him. It is unnecessary to refer particularly to any of the specific allegations, which are stated as having occurred before the years 1846 or 1847, as there is no evidence to sustain them. It is charged, however, that in 1846, or 1847, he struck her several blows with a stick, and choked her; and this charge is, we think, substantially made out by the testimony. There are other acts of violence of a similar character which are also proved, but a court would not be authorized to grant a divorce upon acts of cruelty which were not specifically alleged. The law, it is true, very properly allows the court to consider and give weight to matters which are not pleaded, as tending to explain and corroborate those which are; but they cannot be the foundation, or only ground, for a divorce.—*Whisper v. Whisper*, 4 Barb. 217.

It is urged, however, on the part of the appellant, that none of the specific allegations of cruelty are established, and for that reason the case made by the complainant is not the same as that which is made by the bill. It is certainly true that the testimony does not prove the particular act of violence,

which we think is substantially proved, precisely as it is stated in the bill ; but this is not necessary. All the circumstances which conduce to establish the charge need not be stated, nor, if stated, are they required to be proved unless they are essential. The strictest application of the rule does not require that more than the substance of the issue should be proved ; and if the specification was that the defendant beat the complainant severely with a stick, while the evidence showed that it was done with a whip, the variance would be altogether immaterial. So, if the charge was that the violence was inflicted in different modes, only one of which was established, it would be enough ; for the substance of the charge is, that the particular violence offered amounted to cruelty, and the charge is supported by showing any violence of a like kind which could be regarded as cruel within the meaning of the statute.—Clay's Dig. 170, § 3. To hold otherwise, would be to make the rule of pleading more stringent in this class of cases, than it is at law, even in cases of felony. Wordle's case, 2 East's P. C. 785 ; Page's case, *ib.* ; Johnson's case, *ib.* 786 ; *ib.* 341. Here, one of the charges made by the complainant is, that the defendant struck her several times with a stick, choked her down, drew his knife, and threatened to cut her throat ; and the evidence is, that he choked her, struck her with the whip he used for the correction of the negroes, and pulled her hair. The trifling discrepancies between the charge and the proof amount to nothing, and we regard the act of violence as proved sufficient to sustain the act which is charged, and should be of opinion that this act, taken in connection with other facts which are established, would, under ordinary circumstances, warrant a divorce. We say, *under ordinary circumstances* this would be the case, for the reason, that it is not every instance of harsh, or even unmanly violence, which would necessarily give to the wife a right to a divorce. There are, of course, some acts of violence, such as involve danger to life, limb, or health—acts which render it absolutely necessary for the safety of the wife that she should be separated from the husband ; and when conduct of this character is proved, it admits of no palliation or excuse, if intentionally done. But every species of violence is not of this character. Cruelty is frequently a

term of relative meaning. Between persons of education, refinement, and delicacy, the slightest blow in anger might be cruelty; while between persons of a different character and walk in life, blows might occasionally pass without marring to any great extent their conjugal relations, or materially interfering with their happiness. We can lay down no certain rule, as to what violence will amount to cruelty, where it does not affect life, limb, or health. Each case must depend on its particular circumstances. The doctrine, too, of recrimination applies to cases of this character; and the rule established by the authorities is, that where the wife has brought upon herself the ill treatment of which she complains by her own misconduct, and it is not wholly out of proportion to the offence, or without any excuse when considered with reference to the provocation, before the court will lend an ear to her complaints, she must at least attempt to remedy the evil by a reformation of her own conduct. If, by a gross violation of her duties as a wife, she has provoked the husband to go further even than he should have gone, the blame in a great measure rests with herself, and it would require a much stronger case to authorize a divorce, than if her conduct had been blameless. Were it otherwise, the wife would have nothing to do but to aggravate her husband beyond endurance, and then complain of the treatment of which she alone was the cause. The way of reform is open to her, and if afterwards the husband is guilty of cruelty, the court will interpose in her behalf.—*Waring v. Waring*, 1 En. Ec. R. 211; *Best v. Best*, 2 *ib.* 158, 163; *Moulton v. Moulton*, 2 Barb. Ch. R. 309; *Poor v. Poor*, 8 N. H. 307.

In making an application of the principles to which we have adverted to the facts of the present case, we do not consider it necessary to go into the evidence in detail. The parties were married in 1843, and appear to have got along together tolerably until 1846,—at least we find her admitting, in 1845, that he had up to that time treated her kindly and affectionately, and that but for her children there would be no difficulty. In the year 1846, we have the first evidence of misconduct on her part, in the abuse of J. S. David and her husband, when the former visited the house for the purpose of purchasing a negro. We know that females are sometimes

apt to have views of their own as to the rights of their husbands over property which they bring them, and we do not deny that, generally speaking, it is proper and right to consult them as to the disposition of such property ; but it is, to say the least of it, highly unbecoming in a female to abuse a visitor, who comes to the house on a matter of business with her husband. In December of that year, or early in 1847, we have evidence of a still more unbecoming (not to say outrageous) exhibition of temper on her part, apparently without the least cause or provocation. We allude to her interruption of family worship—her abuse of the divine, who was a visitor at the house, engaged in the performance of the service, and the verbal castigation which she inflicted on her husband, who exercised a degree of forbearance, at least in the presence of strangers, which she did not always exhibit. We pass over the fact, satisfactorily established by the same witness—who is not connected with either of the parties, was an inmate of the family for three months, and lived near them for nine months—that her general treatment of her husband was harsh and unkind ; that in the presence of third persons she was in the habit of bestowing on him the epithets of “ tallow-faced devil”, “ poor scamp”, “ worth nothing”, “ liar”, &c.; and that sometimes, when there was company at the house, she would sit at table without speaking to the appellant, and refuse to help his plate. Then there is the scene which occurred in the presence of the witness Pearson, which is detailed by him with great fullness, and which, we might have been inclined to think, was a little exaggerated, were we not in some measure prepared for it by the evidence of the other witness, and the attack on the preachers. From what she said to this witness, the only just inference is, that the parties had been quarreling in the morning, and the appellant, either for the purpose of alarming his wife, or actually with the view of ridding himself of his troubles, attempted to drink off the contents of a vial of poison, which stood on the sideboard. She tried to prevent him, and in the scuffle the vial was broken ; and the husband, his design to make way with himself in that mode being frustrated, went off, threatening to hang himself. Mrs. David testified by her tears and confessions her compunction for driving him to this



extremity ; but on seeing him ride up to the gate, her feelings underwent a most sudden change, and she exclaimed, "There he is coming ; I knew he was'nt going to hang himself—I wish to God he had!" and then announced her intention of giving him "a blessing", which promise she fulfilled by lavishing on him, according to the testimony of the witness, the most unmeasured and intemperate abuse, in language which, if not absolutely indecent, was at least low and profane—such as no female who had any respect for herself should have uttered. Conduct of this kind requires no comment. It may be that it was owing to the natural violence of a temper aggravated, as some of the witnesses seem to think, by an indulgence in the use of ardent spirits, though we do not regard the evidence on this point as satisfactory ; but, if such was the case, it is no palliation. There may, as we have intimated, be cases where the offer of personal violence to a female might properly be regarded as an act of barbarous and unmanly cruelty ; but we must discriminate—we must not be so unjust as to put all of the sex on the same level ; and if a woman chooses to unsex herself, and forget that she is a female, she should not complain if others do not always remember it. The conclusion which a careful examination of the testimony has made upon our mind, is that the appellee was a woman of the most violent and aggravating temper, which she takes no pains to control, and entirely wanting in that refinement and delicacy of feeling which would cause her to measure the cruelty of a blow from her husband by any other standard than the bodily pain it occasioned. We think, too, the evidence establishes that the ill treatment she has received has been owing mainly to her own misconduct. A woman who is in the habit of cursing her husband, bestowing upon him in public the most degrading epithets, and grossly insulting his friends when they come to his house, does not occupy a very favorable position in a court of equity, when seeking to be relieved from a contract, the duties of which she has thus violated ; and as the principal act of ill treatment is proved to have originated in a quarrel, the particulars of which the evidence does not disclose, but in which it is reasonable to suppose she acted in accordance with her temper and habits ; and as no serious injury appears to have been contemplated,

or resulted, we cannot, under all the circumstances, consider her as entitled to a divorce.

We would not, however, be understood as defending, or even excusing, the conduct of the appellant. That he may have been greatly provoked and irritated, we do not doubt; but from the testimony we are strongly inclined to the opinion, that the property of the appellee was the principal inducement to the marriage on his part. At all events, it is certain that his conduct was not free from blame. While he gave the most indubitable proofs of being able to control his temper in the presence of third persons, he did not in private always exercise that degree of forbearance and meekness which became him as a man dealing with the mother of grown children, and as a professor of a christian church. The fault of the wife, in the use of the most irritating language, although it may prevent her from succeeding in a suit for a divorce, is no excuse for the infliction of personal violence of the character which the evidence shows was used in the present case.

Under the influence of the views we have expressed, the decree of the chancellor must be reversed, and a decree here rendered dismissing the bill; but the costs in this court and the court below must be divided—one-half to be paid by each party.

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FIREMEN'S INSURANCE COMPANY OF MOBILE  
vs.  
COCHRAN & CO.

[TROVER FOR CERTAIN BILLS OF EXCHANGE AND PROMISSORY NOTES, WHICH DEFENDANTS RECEIVED, BY UNAUTHORIZED TRANSFER, FROM PLAINTIFF'S SECRETARY.]

1. *Pleading*—*Demurrer to several pleas, of which one is good, may be overruled.*—Where a demurrer to several pleas, each going to the whole declaration, is overruled, and the plaintiff declines to reply, the judgment on the demurrer will not be reversed on error if any one of the pleas is good.
2. *Transfer of bills and notes by unauthorized person is a conversion.*—The unau-

## Firemen's Insurance Co., v. Cochran &amp; Co.

- thorized transfer, by the secretary of an incorporated insurance company, of promissory notes and bills of exchange belonging to the company, is a conversion for which trover may be maintained.
3. *Conversion waived by subsequent ratification of transfer.*—Such a conversion may be waived by a subsequent ratification by the company of the transaction, with full knowledge of all the facts; and the ratification may be either express or implied.
  4. *Ratification implied from bringing assumpsit against secretary, and taking judgment against transferee as garnishee.*—If the plaintiff, with full knowledge of the tort, brings assumpsit against its secretary for the amount of the bills and notes, summons the transferee by process of garnishment, takes judgment against him for the balance of indebtedness admitted by the answer on account of the bills and notes, and coerces satisfaction of the judgment—this will be held a confirmation of the transaction, and will estop the company from afterwards bringing trover against the transferee.
  5. *Single cause of action cannot be split up into several.*—A single cause of action cannot be split up or divided into several; and this rule applies as well when the entire cause of action cannot, as when it can be recovered in the first action.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

TROVER by the appellant against S. W. & S. G. Cochran & Co., to recover the value of certain bills of exchange and promissory notes, amounting in all to near \$20,000. The defendants pleaded the general issue, together with several special pleas, which are as follows:—

“2. That on the 28th December, 1850, plaintiff sued one Rufus Greene, who before that time had been the secretary of said insurance company, in assumpsit, in the said City Court of Mobile, for and on account (among other things) of said identical matters embraced in this suit—to-wit, for the amount of said bills and notes for the conversion of which this suit is brought; which said suit was begun, conducted, and carried to judgment, as hereinafter set forth, on the ground that said Greene had become indebted to plaintiff by reason of his having, as secretary of said company, converted said bills and notes to his own use, and disposed of them to these defendants. And defendants further allege, that pending said suit, and ancillary thereto, plaintiff sued out an attachment against said Greene, and various branch attachments, and garnisheed (among others) these defendants, S. G. & S. W. Cochran, and also John R. Blocker, John G. Gra-

ham, and Jarvis Turner, to appear and answer what they were indebted to said Greene, what effects of his they had, &c.; whereupon such proceedings were had, that in said City Court, and on the 1st July, 1851, plaintiff recovered of said Greene, in said suit, the sum of \$95,000, and costs; which said judgment covered and was for the full amount of the said bills and notes sued for in this action, and which suit and proceedings and recovery were on the ground and because the said Greene, as secretary of said company, had embezzled, used, and passed off said bills and notes, and thereby became, on the plaintiff's election, its debtor; and further, under the garnishment against these defendants before mentioned, these defendants answered, that they were indebted to said Greene in the sum of \$4280 95; the truth of which answer the plaintiff contested, by the oath of Wm. Dunn, the president of said company, whereupon an issue was formed to try the truth of the same; and afterwards the plaintiff took judgment against these defendants, S. G. & S. W. Cochran, for the amount of their answer aforesaid, with interest from the 1st February, 1850, for the collection of which plaintiff sued out execution, and which they compulsorily by said execution collected of said defendants, in part satisfaction of said judgment against said Greene. And defendants further allege, that by said garnishment against said Blocker, plaintiff recovered judgment against said Blocker for \$150, which it collected in part payment of said judgment against said Greene; that said Jarvis Turner answered to the garnishment against him that he had in his hands a large amount of property of said Greene, whereupon plaintiff took judgment against him for the same, with order of sale of the property, in payment of said judgment against said Greene, and which property has been so sold, and has realized a large sum of money, which plaintiff has received on said judgment against said Greene; that under the garnishment against said Graham, plaintiff recovered judgment against him, for the sum of \$649 91, which it has collected in part payment of said judgment against said Greene. And defendants further show, that plaintiff afterwards further sought to enforce said judgment against Greene, by a further motion before said court against this defendant, S. W. Cochran, on his answer to special interrogatories put



by plaintiff to him, as garnishee as aforesaid ; which motion was refused. And defendants further allege, that said plaintiff, in further payment of said judgment against Greene, recovered of said Greene the sum of \$36,318 14, in part payment of said judgment, and further took from said Greene a conveyance to said Dunn, for plaintiff, for a large amount of valuable property, to satisfy said debt of Greene's to plaintiff, made a debt by plaintiff's election ; and further to satisfy said judgment, said Dunn is prosecuting in the Circuit Court of Mobile, for said plaintiff, against one Thomas McMillan, an action of detinue for a large amount of valuable property, which plaintiff insists it has a right to recover and apply to said judgment against said Greene. Wherefore, by reason of said acts and proceedings, defendants say, that plaintiff has waived the tort for the conversion of said bills and notes, and is barred and precluded from maintaining their action of trover against these defendants."

" 3. Same as second plea, with an express allegation that said proceedings were had and prosecuted with the knowledge of the tort by Greene."

" 4. Same as second plea, with the additional allegation that the answer of defendants, as garnishees, showed that they were indebted to said Greene, in the sum of \$739 95, on account of bills receivable ; and that the same constituted part of the amount, and appeared on the answer filed to constitute a part, of defendants' indebtedness to Greene for which judgment was taken against defendants as garnishees, and that said indebtedness was the balance due said Greene on account of the transfer by him to defendants of the identical bills and notes for which this suit is brought."

" 5. Same as last, except that the plaintiff knew that said sum of \$739 95, answered as owing to Greene on bills receivable, was on account of the very notes and bills now sued for, and, so knowing, took judgment on the answer."

" 6. The defendants plead, as an act of election and ratification, the bringing assumpsit against Greene, as alleged in second plea, and taking judgment thereon."

The plaintiff demurred to all these special pleas, but the demurrer was overruled by the court ; and on the plaintiff's declining to reply, on leave given, judgment was rendered for

the defendants. The overruling of the demurrers is now assigned for error.

J. T. LOMAX and D. C. ANDERSON, with whom was WM. G. JONES, for appellant:

I. The plaintiff could have sued Greene in trover; and the principle is incontestable, that a party claiming in the same right against more than one may sue them separately or collectively, in tort or *ex contractu*, until he is satisfied.—18 Ala. 254; 19 *ib.* 647; 20 *ib.* 320. That Greene was sued in assumpsit for the amount of these notes and bills cannot affect the plaintiff's rights against others implicated in his transactions.

II. The pleas admit that the plaintiff once had a right of action against these defendants; and there has been no release, or satisfaction of the recovery against Greene; nor has plaintiff been guilty of laches, or done anything to affect the relations or rights subsisting between Greene and the defendants. A clear and acknowledged right of action, once vested, cannot be destroyed, except by release under seal, or something given in satisfaction of the wrong.—20 Ala. 256.

III. The defence is rested upon the form of action adopted against Greene, which (it is contended) legitimates his previous dealings with the defendants, and is inconsistent with the claim now set up. Conceding that the declaration in assumpsit against Greene is technically a full admission of a contract vesting him with title, still plaintiff is not estopped; it is not averred, nor can it be with truth, that defendants acted under the influence of such admission, since the bills had passed to them before the action against Greene was instituted.—1 Green. Ev. § 209. Allegations in pleadings, though in a bill in equity, not sworn to, are not evidence as admissions against the party making them; and much less ought they to be so held when taken by the pleader from established forms.—4 Ala. 25-7. A plaintiff is committed by the form of action his attorney may select, only so far that the proceedings and evidence must be consistent and conform to the pleadings; as if he bring assumpsit, and a set-off be pleaded, he shall not repudiate his action and insist on a tort.—Smith v. Hodson, 4 Term R. 212; Dalton v. Whittend, 3 Ad. & El. 961, or 43 E. C. L. R. 1056.

IV. The only recovery which plaintiff could have had in assumpsit against Greene, in regard to this transaction, would have been for a breach of his contract to safely keep the bills and notes entrusted to him, or for the money which he received on the sale of them, in a count for money had and received. The pleas do not allege that he was sued for the proceeds, and a recovery had under that count; but that the judgment was rendered for the amount—that is, the value—of the bills and notes embezzled and passed off by him. There is no reason why a suit, though in assumpsit for the breach of contract, or for the value of the bills, if the suit was on that ground, could convert Greene's tort into a matter of contract, and vest him with title, which enures to the defendants, who participated in his act. According to the ancient doctrine, a party could not waive a tort and sue in assumpsit.—2 W. Black. 827. But since a recovery in assumpsit is allowed, with certain limitations, for damages arising out of a tort, can it have any different operation, as to persons not parties to the particular action, than would an action of tort? If Greene had been sued in trover, nothing but satisfaction of the recovery could bar the present action? Cochran & Co., in this matter, were joint tort-feasors with him; and plaintiff's action against him was but an unsuccessful effort to recover for his tort. We admit that there are authorities which sustain the doctrine contended for by defendants, and hold that a recovery in trover, without satisfaction, is a bar to another action for the same property; but such is not the principle recognized by our decisions.—18 Ala. 254; also, Hyde v. Noble, 13 N. H. 494; Morris v. Robinson, 3 B. & Cress. 196.

V. It may be conceded, without prejudice to the plaintiff's rights, that if a judgment had been recovered against Greene on a money count, for the specific amount received by him on the sale of these bills and notes, this action could not be maintained. But the pleas do not make that distinct averment, and we are not authorized to infer that such was the fact, or even that there was such a count in the declaration; and if there was, the pleas admit that the suit against him was for other matters besides the amount of these notes, and the count for money had and received may have referred to those other

matters. The pleas are to be taken most strongly against the defendants; and if they intended to present such a defence, it should have been specially set out. The pleas do not allege that they paid Greene anything for the bills, nor in what manner they acquired them; and it cannot be assumed that he received some equivalent for them, by which his means of satisfying our judgment were increased, and that we have thus realized a benefit from that consideration. Even if they could show that they had paid him the full amount, our right of action against them would not be affected, unless it was also shown that we ratified the sale by suing for the money so received. The allegation that the plaintiff, by its election, ratified Greene's act, is an argumentative deduction from the facts.

VI. The plaintiff could not, as seems to be assumed in the pleas, have recovered in assumpsit against Greene for the value or amount, upon his mere conversion of the bills and notes.—*Crow v. Boyd*, 17 Ala. 54; *ib.* 737. No averment of that fact, or proof that such a recovery was allowed by the court, would be admissible to estop the plaintiff in the present suit, for that subject was not within the scope of the pleadings in that action.—6 Ala. 27; 8 *ib.* 436.

VII. If the prosecution of the suit against Greene does not estop the plaintiff, the means resorted to for the satisfaction of the recovery cannot. It is not averred that anything was given or accepted in satisfaction, or that the parties acted with that understanding. This action was pending when the answer in garnishment was filed, and the defendants were thus notified that the bills and notes belonged to plaintiff; and consequently, if any indebtedness existed, it was to the plaintiff, and not to Greene. In that proceeding plaintiff could only recover what Greene could have recovered in *indebitatus* assumpsit (15 Ala. 183); and if defendants unnecessarily or improperly blended that item with the amount which they admitted to be due to Greene, surely it was not the plaintiff's duty to reject it, or refuse to take judgment for the full amount. They had not been specially interrogated as to any indebtedness to Greene upon this transaction; and even if the pleas show that they did so answer, it would be nothing more than a voluntary payment, which could not estop



the plaintiff, unless it had been accepted expressly in satisfaction of the demand in suit.—Wadsworth v. Marsh, 9 Conn. 481. The acceptance by Dunn of Greene's conveyance cannot bring the case within the principle; it has nothing of the character of an accord, as the taking of an agent's note for goods converted by him.—Story on Agency, § 254. Greene could not set up the conveyance in bar of a recovery against him, or in satisfaction of the judgment; and certainly these defendants are not to be more favored.—Morris v. Robinson, 3 Barn. & Cress. 196; Drake v. Mitchell, 3 East, 251; White v. Sanders, 32 Maine, 188. Estoppels are not favored, because their tendency is to prevent the investigation of truth. 1 Saund. Pl. & Ev. 37.

R. H. SMITH, *contra*, made the following points:—

1. If either one of the pleas is good, though all the others are bad, the judgment will not be disturbed.—Ferguson & Scott v. Baber's Adm'rs, 24 Ala. 402; Hooks v. Smith, 18 *ib.* 338; Kent v. Long, 8 *ib.* 47; 1 Smith's (Ind.) R. 257; 3 Eng. 502; 8 Blackf. 562; 2 *ib.* 291.

2. The pleas constitute a good defence to the action, on the ground of election of remedy. The actions of assumpsit and trover have each their peculiar incidents, which produce widely different results, and from which is derived the rule that counts *ex contractu* and *ex delicto* cannot be joined. The plaintiff may have several remedies, but they must be harmonious—they must not produce a double recovery, or incongruous results. The mere bringing of assumpsit against Greene is an election to waive the tort. The same act cannot be both a tort and a contract; and plaintiff, though having the right to regard it in either light, cannot treat it as both at one and the same time.—Story on Agency, §§ 254, 259; Fenimore v. United States, 3 Dall. 357; Smith v. Hodson, 4 Term R. 212; Van Dyke v. The State, 24 Ala. 81; 3 Johns. Ch. 261, 416; 1 Hill's (N. Y.) R. 240, and note; 5 *ib.* 578; 5 Stew. & P. 340; 23 Ala. 783; 22 *ib.* 405; 20 *ib.* 216; 15 *ib.* 705; Addison on Contracts, 407; Buckland v. Johnson, Law Reporter for July, 1854, p. 167.

3. The recovery against the defendants by garnishment, with the satisfaction of it, is an election, and also a former

recovery and satisfaction. A garnishment is a suit at law for a debt. It is a suit in which plaintiff has the peculiar advantage of making a man a witness against himself; it is extremely inquisitorial: the plaintiff has the right to the fullest and most exact details, and then has the right of contesting the oath. This right plaintiff availed itself of to its fullest extent, and thereby barred a recovery in this action.—23 Ala. 659; 12 *ib.* 90; 8 *ib.* 574; 7 *ib.* 157; 6 *ib.* 704; 5 *ib.* 442.

RICE, J.—The truth of pleadings is usually established by a verdict. Yet the truth of pleas is as well established by the plaintiff's interposing a demurrer to them, and declining to reply when his demurrer is overruled and leave given him to reply, as by a verdict finding them to be true.—1 Greenl. Ev. § 27.

When several pleas are pleaded, each of which goes to the whole declaration, and the plaintiff's demurrer to them is overruled, with leave to him to reply, which he declines to do; the judgment on demurrer will not be reversed if any one of them is good.—*Barber v. Dixon*, 1 Wilson's R. 44; 6 Com. Dig. tit. Pl. (S. 19); *Puckett v. Pope*, 3 Ala. 552; *Winston v. Moseley*, 2 Stew. R. 137. It will therefore be our duty to affirm the judgment in this case, if any one of the pleas demurred to is good.

The complaint of the plaintiff shows that the conversion of all the notes and bills therein mentioned was a single act. It avers only one conversion. Taking the complaint and the pleas demurred to together, the plain construction of the pleadings is, that the transfer of the notes and bills by Greene to the defendants was a single transaction, and is the conversion complained of by the plaintiff.—*McCombie v. Davis*, 6 East's R. 538; *Harker v. Dement*, 9 Gill's R. 7.

Although this transaction between Greene and the defendants amounted to a conversion, and was liable to be defeated by the plaintiff; yet it was such a transaction as was capable of acquiring validity from the subsequent confirmation of the plaintiff with a knowledge of the facts. The confirmation of the plaintiff might be direct and express, or implied from its conduct and acts. By taking judgment against S. G. & S. W. Cochran, two of the members of the firm sued in the

present action, as garnishees, and coercing and receiving the money from them as garnishees, with a knowledge that part of their indebtedness to Greene admitted in their answer to the garnishment was on account of the notes and bills for the conversion of which this action was brought, and that said indebtedness was the balance due by them to Greene on account of the transfer by him to them of these identical notes and bills,—the plaintiff admitted the validity of (and confirmed) the transaction by which they acquired the notes and bills from Greene, so far as the defendants are concerned, and in law waived its right to enforce a claim for damages, in an action of trover against the defendants, for that transaction.—Butler v. O'Brien, 5 Ala. 316; Sheppard v. Buford, 7 Ala. 90; Moseley v. Wilkinson, 24 *ib.* 411; Rotch v. Hawes, 12 Pick. R. 136; Hewes v. Bagley, 20 *ib.* 90; Southard v. Pope, 9 B. Monroe, 265.

A proceeding by garnishment is a suit. It may well be classed with actions *ex contractu*, because it lies only to subject those demands for which the debtor of the plaintiff in the garnishment could maintain *debt or indebitatus assumpsit*. Lundie v. Bradford, 26 Ala. 512; Cook v. Walthall, 20 *ib.* 334. The plaintiff, in the first instance, with knowledge of the tort by Greene, elected to sue him in *assumpsit* for the amount of the bills and notes, and in that suit recovered their full amount. The plaintiff next elected, during the pendency of that suit, and as ancillary thereto, to sue out against Greene an attachment, and to have S. G. & S. W. Cochran summoned as garnishee; and on their answer the plaintiff obtained judgment, and received the money, part of which it knew at the time to be due by them to Greene for these notes and bills. The plaintiff, after having made its election as aforesaid, brought this action of trover. The plaintiff is concluded by having made its election before this suit was commenced, with knowledge of the facts, from maintaining the present action, which is inconsistent and incompatible with the former remedies to which it resorted.—Rawson v. Turner, 4 Johns. R. 469; McElroy v. Mancius, 13 *ib.* 121; Buckland v. Johnson, July No., 1854, of the Monthly Law Reporter, 167.

We are aware, that there is a class of cases where the

party has concurrent remedies for the same cause of action against several persons, and may carry his several proceedings to judgment, though he is limited to one satisfaction. But in such cases the cause of action is the same, and accrues against all at the same time, and the concurrent remedies are perfectly consistent and compatible with each other. The election and confirmation of the plaintiff, above mentioned, takes this suit out of the rule which governs that class of cases. *Rawson v. Turner, supra*; *Spivey v. Morris*, 18 Ala. 254.

It is an undoubted rule, that one cause of action cannot be split up or divided into several. This rule applies, as well when the entire claim could not have been recovered in the first suit, as when it could have been recovered.—*O'Neal v. Brown*, 21 Ala. 482; *Farrington v. Payne*, 15 Johns. R. 432; *Philips v. Berick*, 16 *ib.* 136. The plaintiff avers and shows but one cause of action—to-wit, the transfer of the notes and bills by Greene to defendants. That transfer is the conversion averred in the complaint. In the garnishment suit, the plaintiff has already had one recovery arising out of that transfer, as above shown. Now, if it be conceded that in that suit the plaintiff did not recover, and could not have recovered, all it was originally entitled to, that concession does not abrogate the rule which forbids the splitting up of one cause of action.—*Philips v. Berick, supra*.

The fifth plea (which consists of all the averments contained in the second and fourth pleas and an additional averment) is clearly good; and the judgment is affirmed.

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### MCVAY'S ADM'R vs. IJAMS.

[DETINUE FOR SEVERAL SLAVES—CONSTRUCTION OF DEED OF GIFT.]

1. *Settled rule of property binding on courts.*—When a rule of property has been settled by judicial decision, and may reasonably be supposed to have entered into the business transactions of the country, it is the duty of the courts to adhere to it, and to leave the corrective to the legislature.



2. "*Heirs of the body*' held limited by '*die leaving*' to issue living at death of first taker, and reversion supported.—A deed of gift was in these words: "I give, grant, and confirm unto my daughter Eliza a negro girl, named Perse, to have, hold, and enjoy said property and her increase during the natural life of my said daughter, which property, at her death, shall descend to the natural heirs of her body; provided always, and upon this condition, and it is the true intent and meaning of these presents, that in case my said daughter *die leaving no natural heirs of her body*, then, and in that case, said property shall revert back and form part of my estate": *Held*, on the authority of Bell and Wife v. Hogan, 1 Stew. 536, that Eliza took only an estate for life, and not the absolute interest; that the words '*die leaving*' limited the words '*heirs of her body*' to issue living at the death of the first taker; and that on her death, leaving no living issue, the grantor's personal representative might recover the property.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. JOHN E. MOORE.

DETINUE by Robert M. Patton, as administrator of Hugh McVay, deceased, for a negro woman (named Perse) and her three children, whom the said McVay conveyed by deed of gift to his daughter Eliza W. Martin. The court charged the jury, that the said deed of gift (for which see the opinion of the court) conveyed the absolute interest in the slaves to the said Eliza, and that consequently the plaintiff could not recover; and this charge, to which the plaintiff excepted, is now assigned for error.

R. W. WALKER, for the appellant:

The appellant insists upon two propositions, either of which, if established, shows the error of the charge. These propositions are, 1st, that the terms '*heirs of the body*', as used in this deed, are words of purchase, and not of limitation; and, 2d, that, even if this is not so, yet the limitation over on the death of Eliza Martin is not too remote, and will be sustained.

1. In the construction of deeds, the cardinal rule is, to arrive at the true intent and meaning of the grantor from a fair consideration of the whole instrument, and to give effect to that intention, if it can be done without violating any rule of law; and if the instrument bears on its face evidence that it was written by an unskillful person, a greater latitude of construction is proper.—Hamner v. Smith, 22 Ala. 433.

When it is apparent that the word 'heirs', or 'heirs of the body', are used as descriptive of individuals, and not of the general line of heirs, they are considered words of purchase. *Price v. Price*, 5 Ala. 578, (581). The terms 'heirs', or 'heirs of the body', are susceptible of explanation; and, when explained, they are not words of limitation, but of purchase. *Keyes on Chattels*, §§ 252, 253 a; *Dunn v. Davis*, 12 Ala. 135; *Powell v. Glenn*, 21 *ib.* 458; *Doyle v. Boulter*, 7 *ib.* 246; *Evans v. Wells*, 7 *Humph.* 559; *Hodgeson v. Bussey*, 2 *Atk.* 89. And in this respect there is no difference between deeds and wills.—*Supp. to Lewis on Perpetuities*, p. 71; *Keyes on Chattels*, § 252; 2 *Atk.* 89; 5 Ala. 578. The words used in creating the limitation over in this case, (even if effectual for that purpose,) and the subsequent reference to Holloman, clearly show that by the terms 'heirs of the body' the donor meant *children*.—21 Ala. 466, and authorities *supra*.

2. The limitation over on the death of Eliza Martin is good as a contingent or conditional limitation. Contingent interests in personalty, and contingent or conditional limitations, may be created by deed without the intervention of a trustee.—*Williamson v. Mason*, 23 Ala. 488; *Keyes on Chattels*, § 344; *Hill v. Hill*, *Dudley's Equity R.* 71, (82). In conveying a perpetual title in personalty, a grantor may provide a contingency, or annex a condition, upon which the title shall determine and revert to himself.—*Hill v. Hill*, *supra*; see the general rule as to remoteness stated, in *Keyes on Chattels*, § 178. Courts catch at everything, even the most trivial expressions, to relieve themselves from the construction of indefinite failure of issue, when applied to personalty; and this, in order to support the limitation over. *Flinn v. Davis*, 18 Ala. 132–48; *Isbell v. Maclin*, 24 *ib.* 321; *Hill v. Hill*, *supra*: *Keyes on Chattels*, §§ 183, 187; 4 *Kent's Com.* 273–8; *Williams v. Graves*, 17 Ala. 62; 2 *Russ. & My.* 390; 2 *Jarman on Wills*, p. 419. The general rule as to remoteness yields to an intention in the context to use the words in the sense of issue living at the death.—See authorities last cited; also, 2 *Russ. & My.* 390; 1 *P. Wms.* 563; 2 *Atk.* 647; *McGraw v. Davenport*, 6 *Port.* 329. This intention is manifested where the words 'dying without leaving issue' are used, or where 'leaving' is inserted before 'issue',

or where the word 'then' follows 'death without issue.' Flinn v. Davis, 18 Ala. 146; Isbell v. Maclin, 24 *ib.* 323; Lewis on Perpetuities, p. 326, and Supp. 85; Keyes on Chattels, §§ 186, 187; 1 Call's R. 338; Dudley's Eq. R. 82; 4 Mon. 149; 2 Durn. & E. 720; 7 Ad. & El. 636; 3 Lomax's Digest, 304; 1 Dev. & Bat. Eq. R. 466; 1 P. Wms, 563, 663; 5 Humph. 505; 14 N. H. 215; 2 Jarman on Wills, 419; Bell and Wife v. Hogan, 1 Stew. 539-41; Doyle v. Boulter, 7 Ala. 246; 3 Dess. 256; 4 *ib.* 330; 3 Atk. 288. Where there are circumstances, or expressions, denoting a definite failure of issue, the limitation will be sustained, notwithstanding the words creating the previous estate, if standing alone, would create an express estate tail.—17 Ala. 62; 21 *ib.* 465; Barlow v. Salter, 17 Ves. 481. There is no distinction between deeds and wills, as to the effect which the use of such words as 'dying leaving no issue', and the like, will have in determining whether the limitation over is too remote. In both classes of instruments, they will be held to refer to a definite failure of issue.—See, particularly, Supp. to Lewis on Perpetuities, p. 71; 6 Hare, 151; 2 Atk. 89. That the words 'to descend to the heirs of their bodies', &c., have no special force in this connection, adverse to the appellant, see 17 Ala. 66.

WM. COOPER and JNO. S. KENNEDY, *contra*:

The deed of McVay conveyed an absolute estate to his daughter Eliza, and not merely a life estate. There are words in the deed utterly inconsistent with the idea of a limited estate in the first taker. The obvious intention of the grantor, to be deduced from the force and general tenor of the deed, was to convey to his daughters and a class of persons known as the "natural heirs of their bodies", which would embrace their descendants indefinitely, and however remote in the descending line. This is the evident intent and effect of the deed, and of itself establishes the position that it was intended to create an estate of inheritance in the descending line. But, in aid of this view, the words 'to descend to the natural heirs of her body' repel the idea that the children (if any) were to take by purchase, and fix the fact that they were to take by descent; and if so, then the first



taker took an absolute estate, unincumbered with reversions, and the plaintiff cannot recover. The decisions on instruments of this kind are so various, that we are often left much in doubt in attempting to reconcile them ; but it is believed, on a close examination of the case, that the above positions are supported by the following authorities : 1 Preston on Estates, pp. 263, 419 ; Law Magazine of 1853, p. 368 ; 9 Gill's R. 432 ; 1 Hawks' R. 247 ; 1 Nott & McC. 69 ; 9 Yerg. 210 ; 4 Har. & McH. 393 ; Keyes on Chattels, §§ 246, 248, 249, 250, 254 ; Darden's Adm'r v. Burns, 6 Ala. 364 ; Machen v. Machen, 15 *ib.* 373 ; Ewing v. Standifer, 18 *ib.* 400 ; Hamner v. Smith, 22 *ib.* 433 ; Lenoir v. Rainey, 15 *ib.* 667. None of these cases are affected by Powell v. Glenn, 21 Ala. 458, which was mainly relied on by the plaintiff in the court below.

CHILTON, C. J.—This case turns upon the construction of the deed of gift, made by McVay to his daughter, Eliza W. Martin. The language is—"I give, grant, and confirm unto Eliza W. Martin, a negro girl, named Perse, to have, hold and enjoy said property and her increase, during the natural life of my said daughter ; which property, at her death, shall descend to the natural heirs of her body ; *provided* always, and upon this condition, and it is the true intent and meaning of these presents, that in case my said daughter above named die, leaving no natural heirs of her body, then, and in that case, said property above given to revert to my estate, to be repossessed and enjoyed by myself, or legal representative", &c.

Eliza, the daughter, died without leaving issue living at the time of her death, and the plaintiff, as administrator of McVay, who is also dead, brings his suit for the property ; and insists, that by the terms of the conveyance there has been a reversion of the property back to him. On the other hand, it is contended, that the gift to Eliza vested the absolute interest in her ; and so the primary court charged the jury.

It is difficult to recognize in *Forth v. Chapman*, 1 P. Wms. 663, the good sense of the distinction which gives to the same words used in the will an entirely different meaning when applied to real and personal estate.—that 'dying without leaving issue', when referred to land, should mean an in-



definite failure of issue, and create an estate tail, but, when applied to personalty bequeathed over in the same will, should mean a definite failure of issue—that is, issue living at the time of the first taker's death. It is, perhaps, equally difficult to see the force of the distinction taken by many of the authorities between 'dying without issue' and 'without *leaving* issue.' Upon both of these points, there is a distressing conflict of authority, as there will generally be, when, in the astuteness of courts to carry out what they suppose to be the intention of testators, distinctions are seized hold of which have no foundation in reason, and which, we can hardly suppose, ever entered into the mind of the testator. When, however, a rule of property has been adopted by judicial decision, and may reasonably be supposed to have entered into the business transactions of the country, it is our duty to adhere to it, lest we should overturn titles founded upon it. In such case, it is better to leave the corrective to the legislature.

In *Bell and Wife v. Hogan*, 1 Stew. 536, decided in 1828, the testator lent to his daughter six slaves, naming them, and their increase, during her natural life; and if the daughter should leave an heir, or heirs, lawfully begotten of her body, he gave the said slaves to said heir or heirs so begotten, to them and their heirs forever; and for want of such heirs, he desired that said slaves, with their increase, should be equally divided among his four children, naming them. It was said by the court, Chief Justice Lipscomb delivering the opinion, "The failure of heirs must refer to the failure of her issue, and the word 'leave' sufficiently limits the time when the devise is to take effect; that is, if at all, at the death of the first taker." The deed under consideration was executed several years after the decision above alluded to, and, for aught we can know, was influenced by it. Be this as it may, we do not feel at liberty to depart from that decision at this late day, when it has never been overruled, but has incidentally been recognized by several subsequent decisions.—See, also, *Keyes on Chattels*, §§ 186, 187, and cases cited by this author.

It follows that, as the term 'heirs of the body' of the daughter is limited by the term 'leaving' to issue living at the death of the first taker, the doctrine applicable to estates tail

cannot be applied. The reason why the words 'heirs of the body' ordinarily create an estate tail is, that they include issue *in infinitum*. They cease to have this effect when limited to issue living at the time of the first taker's death.—Hodgeson v. Bussey, 2 Atk. 89.

Adhering to the principle settled in the case of Bell and Wife v. Hogan, *supra*, there is a clear distinction between this case and those cited by the counsel for the appellee from our own reports.

By the term 'to descend' to the natural heirs of her body, &c., we merely understand the testator to mean that it *shall go to them*, as succeeding the parent, and not as affixing a descendible quality to the property. There is, technically speaking, no such thing as personal property descending to heirs: it goes to personal representatives, and by distribution to the heirs. Yet, under the rule in Shelley's case, which we have held applies to personal property, when the terms 'heirs of the body', or 'heirs generally', are not merely *descriptive of the particular* persons to take under the deed or will, but as designating the line of descent, the absolute interest passes. In this case, under the rule in Bell and Wife v. Hogan, the words are descriptive of a particular class of persons who are to take—issue of the daughter living at her death—and, consequently, the rule which enlarges the first estate for life into an absolute interest, and cuts off the limitation over in default of such issue, does not apply. In such case, the limitation over in default of such issue is good, and if it fails to take effect as a limitation, there is a *quasi* reversion to the grantor, or his legal representatives as to his personalty, if he be dead.—Williamson v. Mason, 23 Ala. 488.

The attempt here to create a reversion by deed cannot prevail, as a reversion is the act of the law, and cannot be so created. But this limitation to the grantor, or to his representatives, if dead, is void because the law accomplishes the same thing.

There is, therefore, a *quasi* reversion of the property to the appellant, the representative of McVay; and the court mistook the law, in holding that the daughter took the entire, absolute interest in the property.

Judgment reversed, and cause remanded.

## JOHNSTON &amp; CO. vs. DUTTON'S ADM'R.

[ACTION AGAINST PARTNERSHIP ON PROMISSORY NOTE.]

1. *Liability of partnership on note given, with concurrence of majority of partners, for necessary supplies, ordered by one partner, for persons engaged in its business.*—Where three persons are engaged in carrying on a steam saw-mill in copartnership for a specified term, and during its continuance the note of the firm is given, with the concurrence of two of the partners, for necessary supplies, ordered by one of them, for the hands engaged in carrying on the business, the partnership is bound by it.
2. *Effect of notice by one copartner that he will not be bound for any future debt contracted on account of partnership.*—If a firm consists of but two partners, each having an equal voice in the direction and control of the common business, either may protect himself against liability on a future contract, by giving notice of his dissent to the person with whom it is about to be made; and where the partnership consists of more than two persons, one of whom gives notice of his dissent, the party contracting with the others acts at his peril, and cannot hold the dissenting partner liable, unless his liability results from the articles, or from the nature of the partnership.
3. *Majority shall rule, in the absence of express stipulations.*—When a partnership consists of more than two persons, there is an implied understanding, in the absence of express stipulations to the contrary in the articles of partnership, that the acts of the majority, as to all matters within the scope of the common business, shall bind the firm; and if one partner, in such case, gives notice of his dissent before the creation of the contract, he is nevertheless bound by the act of the other partners, and there is no necessity that he should be consulted by them in the matter.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by Charles W. Dorrance, as administrator of William Dutton, deceased, against William Johnston and Samuel Fogg, partners under the firm name of Wm. Johnston & Co., to recover the amount of two promissory notes; one for \$157 32, dated January 8, 1853, and due on that day, and the other for \$149 47, dated December 17, 1852, and due on that day.

The defendant William Johnston filed a special plea of *non est factum*, verified by affidavit, averring that "the notes upon which this action is founded were not executed by him,



or by any one authorized to bind him in the premises"; and, in addition to this, the following pleas:—

"1. That said notes are without consideration, made or had to or by said firm of Wm. Johnston & Co.

"2. That said notes were given by the said Samuel Fogg, in the firm name of Wm. Johnston & Co., for the private debt of him, the said Fogg, and that this was known to plaintiff's intestate.

"3. That the said copartnership of Wm. Johnston & Co., at the time of the date of said notes, was dissolved, and that a suit was then pending in the Chancery Court of Mobile county for a settlement of the accounts of the said copartnership, which was known to plaintiff's intestate.

"4. That plaintiff's intestate, long before the date of said promissory notes, had notice that said Wm. Johnston would not be responsible for any future debts made on account of said mill, in which said Fogg was a partner, either by the firm, or by any member thereof.

"5. That said notes were given by said Fogg to defraud this defendant, the firm name having been signed thereto by said Fogg; and that it was well known to plaintiff's intestate, that neither this defendant, nor said firm of Wm. Johnston & Co., had received any consideration therefor.

"6. That said supposed copartnership of Wm. Johnston & Co. never had any legal existence, nor was there any such copartnership between the parties named in plaintiff's complaint, at any time before or since the making of said promissory notes."

On the trial, the plaintiff offered in evidence the notes described in the complaint, and proved that they were drawn and signed by Samuel Fogg; and also the articles of copartnership between said defendants and one Vanderslice, for the running of a steam saw-mill for the term of five years. "When the articles of copartnership were introduced by plaintiff," as the bill of exceptions states, "they were objected to as evidence by the defendant Johnston, but were admitted by the court, having been first properly proved as to execution and delivery; to which said defendant excepted."

"Plaintiff also introduced a witness, who testified, that these notes were given by Fogg in settlement of an account



which Dutton had for money advanced, and mostly for provisions and groceries ordered by Dutton of one Hampshire, at the request of Fogg, for the firm of Wm. Johnston & Co.; that Vanderslice was present when the notes were signed. There was no distinct proof how the money advanced by Dutton to Fogg had been expended, but there was evidence tending to show that defendants were partners in running a mill, and that they employed a great many hands; nor did the witness know that the articles came to the use of the firm, though he knew that they were sent off in a cart, drawn by a mule, which was used about defendant's mill; that the goods left town in the direction of the mill, and that Fogg said they were for the mill, (to which the defendant excepted;) that the said mill was under the management of Fogg and Vanderslice, who lived at the mill; that though Johnston was occasionally at the mill, he did not reside in Mobile, but in Dallas county; and that all these supplies were furnished before August, 1852.

“Defendant introduced evidence tending to show that, on the 23d June, 1852, he had given notice, by advertisement in the ‘*Tribune*’, a newspaper published in Mobile, that he would not be responsible for any future debts made on account of said mill, either by the firm, or by any member thereof; that Dutton was a regular subscriber of the paper, at, before, and after the publication of the notice. He also gave evidence tending to show personal notice given to Dutton, about September, 1852, that Johnston would no longer be bound by or for any future contracts, made by Fogg without the knowledge and consent of Johnston; that on the 10th September, 1852, Dutton disclaimed having any demand against the firm, except an open account of some \$50 or \$60 advanced to or for Fogg, but said that he did not care for such notice—that Fogg was a partner with Johnston, and that he would stand by him and let him have what money (or what) he wanted. Defendant further gave evidence tending to show that he, by his agent, had liberally supplied the hands at the mill with all the groceries and provisions they wanted, or needed, and with everything that was necessary for the business of the mill; and that since the 12th August, 1852, he had been in possession of the mill himself, and run it himself, and that

Fogg had had nothing to do with it. The witness, however, who gave this evidence, testified, that he knew nothing of milling, nor of the size of the mill; that he could not, at the moment of examination, state the number of hands employed at the mill, nor what was necessary for them, but if he had his books in court, he could do it, as he paid them off every week; that he had employed hands himself, and knew what was necessary to support them; that the supplies were furnished by him, as Johnston's agent, on the orders of Fogg and Vanderslice, and that he paid the bills which Fogg and Vanderslice contracted, which orders witness had been directed by Johnston to fill and pay for, and which were profuse and extravagant; that Johnston lived in Dallas county, and was not in possession of the mill until August, 1852. There was evidence, also, tending to show that Fogg and Vanderslice had run the defendant Johnston to extravagant expenditures about the erection and management of said mill."

The defendant Johnston requested the following charges:

"1. That unless it has been shown to the jury that the copartnership between Fogg, Johnston, and Vanderslice was such as to authorize either one of them to buy groceries on the credit of all the partners, then neither Fogg nor Vanderslice had any such authority.

"2. That unless Fogg was authorized to make notes in the firm name, Johnston is not bound.

"3. That the authority might be shown by the course of dealing of the partnership, if recognized by all the parties; but if not, then it must be shown by the articles of copartnership.

"4. That the articles of copartnership do not show any such authority.

"5. That even if such authority ever existed, the notice given by Johnston through the papers, if brought to the notice of Dutton, would be from that time a revocation on the part of Johnston of any such authority to bind him.

"6. That if it would not, of itself, revoke the authority, the notice so given, and brought home to Dutton, would be sufficient to put him on inquiry as to the authority of the other partners.

"7. If the jury presume, merely from previous dealings of

the parties, an authority in Fogg to bind the firm, that then this presumption would be destroyed by the notice given, if brought to the knowledge of Dutton.

"8. That unless the jury believe that the notes sued on were made by a person who, at the time they were made, was authorized to bind Johnston, then Johnston is not bound by them.

"9. That if Johnston is not bound by the notes sued on, the jury must find for the defendant.

"10. That the word 'means' does not mean credit.

"11. That if the jury believe the goods were furnished by Hampshire, upon an order from Dutton, then Dutton, and not Hampshire, furnished the goods to Fogg, and therefore Dutton, and not Hampshire, would be Fogg's creditor for the amount."

The court gave the third, sixth, seventh, eighth, and ninth of these charges, as asked, and refused to give the others; and to each refusal the defendant excepted.

"Previous to the request to give these charges, the court had charged the jury, at length and in full, upon the law of partnership, the effect of notice, and the legal effect of the articles in this case; and during the summing up, after calling their attention to the fact that they must be satisfied that Fogg was authorized to sign the partnership name by the defendant, before the plaintiff could recover, the court charged the jury, that even if no written articles of partnership existed, yet, if by the usual course of dealing Dutton was authorized to infer that the parties were in partnership, this would be sufficient to justify him in treating the defendant as a partner; and that if the intercourse and dealing between Fogg and Johnston was such as to authorize Dutton to look upon them as partners, then Johnston would be bound by the contract made by Fogg as to partnership matters; to which charge the defendant excepted."

The admission of the evidence objected to, the charge given, and the refusals to charge as requested, are assigned for error.

P. HAMILTON and F. S. BLOUNT, for appellants:

The case made by the record is, an attempt to enforce against a partnership a demand created by advances made to



one partner, by a third person apparently acquainted with the nature of the connection. The note was made without Johnston's knowledge, and in defiance of his notice; a part of the claim was for money advanced to Fogg, and the remainder was for provisions, which are not shown to have been used about the business of the firm, and which most likely went to the private use of Fogg and Vanderslice. No necessity is shown for these supplies; and the purchase of them is not shown to have been within the usual course of the business of the firm. The notes were made after the notice by Johnston had been publicly given, and after Dutton had been personally informed of it; and, further, after he had disclaimed having any such demand, when he was evidently determined to maintain Fogg in his disputes with Johnston. Under this proof, the fifth charge asked should have been given.—1 Stark. 164; 1 Camp. 403; 1 Y. & Jerv. 227; 3 Conn. 124. Even if the goods had been proved to have come to the possession of the firm, still Johnston's notice to Dutton discharged him from the liability which he had directly refused to assume.—5 Watts & Serg. 564; 10 East's R. 264; 3 Conn. 124.

This principle of protection by notice from future liability does not depend on the idea that it works a dissolution of the partnership: it is the means which one partner retains of protecting himself against injury from the implied power of another partner; for the latter is only an implied power, and can be revoked by express dissent.—American Leading Cases, vol. 1, p. 292, and authorities last above cited.

Johnston had the right to dissolve the concern at his pleasure; if by so doing he wrought injury to Fogg, the remedy was by suit on his bond, and a creditor of either has nothing to do with the question.—17 Johns. 525; 19 *ib.* 538; 1 Conn. 60; 3 Bland's R. 574.

ROBT. H. SMITH, *contra*:

There are two cases to the effect that one partner may, without dissolving the firm, restrict the power of his partner to bind the firm, when there are but two partners, by giving notice that he will not be bound; but both these (1 Camp. N. P. 403; 1 Stark. N. P. 164) are cases at *nisi prius*, and both were before the same judge (Ellenborough), though



the first was affirmed in the King's Bench. No similar decision can be found in England, and no authorities are cited to maintain them; and the only American case is, *Leavitt v. Peck*, 3 Conn. 124. These cases are cited and approved by Kent (Com., vol. 3, p. 44); but no notice of them is to be found in Story, and no such principle is announced by him. According to the case in 1 Stark. 164, the rule applies, unless the goods bought came to the use of the firm, or the purchase was assented to; while the case in 3 Conn. 124 shows that this matter must be left to the jury, and that it would have been error in the court to pronounce the purchase not binding. And if the subject-matter of the contract was consistent with the partnership business, the appellant would be bound to show that it was out of the usual partnership dealings.—3 Kent's Com. p. 43; 11 Johns. 544. The clearest exposition of the law, relative to the power of one partner to bind the firm notwithstanding the dissent of another, is found in Parsons on Contracts, vol. 1; p. 156, and cases there cited in note.

GOLDTHWAITE, J.—The evidence in this case tended to show that appellants and one Vanderslice carried on in copartnership a steam saw-mill, which, by the articles of copartnership, was to continue at least five years; that the note sued on was given with the concurrence of two of the partners, Fogg and Vanderslice, for supplies necessary for the hands engaged in carrying on the mill, which had been ordered by one of them. Upon these facts alone, there can be no doubt that the firm would be bound. The furnishing of the supplies to those engaged in the immediate direction of the business, was essential to the conducting of it, and within the scope of the purposes for which the individuals had associated; and the authority of either of the partners to purchase such supplies, and give the note of the firm, cannot be questioned.

The principal ground of objection, however, is, that the evidence proved that, before the goods were furnished and the note given, the appellant, Johnston, gave notice to the public that he would not be responsible for any future debt contracted on account of the copartnership, and that this notice was brought home to the party with whom the debt

was contracted ; and it is insisted that its effect was, to revoke the authority of the other partners, so far as he was concerned, to bind the firm from that time.

It is to be observed, that in the present case the contract was concurred in by two members of the firm ; and the question, therefore, is, as to the right of the majority to bind the other partners, against their dissent, as to matters appertaining to the common business, and in the absence of any stipulation conferring that power in the articles of copartnership. This question is a new one in this court, and indeed we have found no case in which it has been expressly decided. Both in England and the United States, there are cases which assert the general proposition, that a partner may protect himself against the consequences of a future contract, by giving notice of his dissent to the party with whom it is about to be made.—Gallway v. Matthew & Smithson, 10 East, 264; Willis v. Dyson, 1 Stark. 164; Vice v. Fleming; 1 Y. & Jerv. 227-30; Leavitt v. Peck, 3 Conn. 125; Feigley v. Sponeberger, 5 W. & S. 564; Monroe v. Conner, 3 Shep. 178. And where the firm consists of but two persons, and there is nothing in the articles to prevent each from having an equal voice in the direction and control of the common business, the correctness of the proposition cannot be questioned. In such case, the duty of each partner would require him not to enter into any contract from which the other in good faith dissented ; and if he did, it would be a violation of the obligations which were imposed by the nature of the partnership. It would not, in fact, be the contract of the firm ; and the party with whom it was made, having notice, could not enforce it as such. So, if the firm was composed of more than two persons, and one of them dissented, the party with whom the contract is made acts at his peril, and cannot hold the dissenting partner liable, unless his liability results from the articles, or from the nature of the partnership contract. All the cases can be sustained on this principle : and it is in strict analogy with the civil law, which holds where the stipulations of the partnership expressly entrust the direction and control of the business to one of the partners, that the dissent of the other would not avail, if the contract was made in good faith (Pothier Traite du Com. de Soc., No. 71, 90) ; and such also,

we think, is the rule of the common law.—Const v. Harris, Turn. & Russ. 496; Story on Part. § 121. Were it otherwise, it would be denying to parties the right to make their own contracts. If our views as to the governing force of express stipulations are correct, the effect of such terms or conditions as result by clear implication from the articles, or arise out of the nature of the partnership, must be the same. It is as if they had been expressly provided.

Now, whenever a partnership is formed by more than two persons, we think that, in the absence of any express provision to the contrary, there is always an implied understanding that the acts of the majority are to prevail over those of the minority, as to all matters within the scope of the common business; and such we understand to be the doctrine asserted by Lord Eldon in Const v. Harris, *supra*, and such was the opinion of Judge Story.—Story on Part. § 123; 3 Kent's Com. (5 edit.) 45. The rule, as thus laid down, is certainly more reasonable and just, than to allow the minority to stop the operations of the concern, against the views of the majority. We do not say that it would be deemed a *bona fide* transaction, so as to bind the firm, if the majority choose wantonly to act without information to or consultation with the minority (Story on Part. § 123); but when, as in the present case, the one partner has given notice, and expressed his dissent in advance, there could be no reason or propriety in requiring him to be consulted by the other two.

We do not consider the cases to which we have been referred, holding that one partner has the right at pleasure to dissolve a partnership, although the articles provide that it is to continue for a specified term (Marquand v. New York Ins. Co., 17 Johns. 525; Skinner v. Dayton, 19 *ib.* 513, 538), as having any bearing on the case under consideration. Conceding they are law—which is doubtful (Story on Part. § 275, n. 3, and cases there cited)—the decisions rest solely upon the ground, that the limitation or the right of dissolution is incompatible with the nature of the copartnership contract; and this principle does not militate against the positions we have asserted. The dissent, in the present case, cannot be regarded as a dissolution; for, if effectual, it would not necessarily produce that result, although it might operate to change



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the mode of conducting the business. In other words, it might be carried on without contracting debts.

Our conclusion is, that the act, being concurred in by two of the partners, was, under the circumstances, the act of the firm ; and that the charge, asserting the proposition that the dissent of one partner against the other two would necessarily exonerate him, was properly refused.

Judgment affirmed.

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## MOORING ET AL. *vs.* MOBILE MARINE DOCK & MUTUAL INSURANCE COMPANY.

[ACTION BY INSURANCE COMPANY TO RECOVER PREMIUM.]

1. *Negotiable note of debtor, taken at or after creation of the debt, not per se payment.*

The taking of a debtor's negotiable note, at or after the creation of the debt, is not a payment or extinguishment of the debt itself, unless there is an agreement so to receive it : in the absence of any such agreement, if the note is not paid at maturity, the creditor may sue on the original cause of action ; and if he produces the note at the trial, and offers to give it up to the defendant, and the evidence shows that it was taken " for the purpose of closing the account on the books", it is not error to instruct the jury that " the taking of the note does not raise the presumption of payment."

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by the appellee against Jacob B. Walker, James A. Mooring, and S. G. Stone, " to recover the sum of \$116 68, due by open account on the 21st February, 1853, for work, labor, and materials furnished, at the request of defendants, in and about the repairs and fitting up of a certain steamboat, called the ' Frank Lyon', the property of said defendants ; also, the sum of \$451, the premium of insurance due and payable from defendants to plaintiff on the 4th April, 1853, in respect of said plaintiff having before that time underwritten a policy of insurance, on behalf and account of said defendants, and at their request, for the insurance of



a large sum of money—to-wit, the sum of \$5,000—upon the said steamboat, from the 4th October, 1852, to the 4th October, 1853; which several sums of money, with interest thereon, are now due."

It appears that Walker did not defend the suit, but the other defendants separately pleaded, 1st, the general issue; 2d, payment and satisfaction; 3d, that plaintiff released and discharged them before this suit was brought, and received the note of their co-defendant (Walker) in full payment and satisfaction of said supposed promises.

"The only contest," as the bill of exceptions states, "was in reference to the \$451 premium of insurance charged by the plaintiff for assurance on the Frank Lyon, and the only witness examined in reference to this item was J. S. Secor, the secretary of the company, who proved, that the said steamboat, at the time of effecting the insurance, belonged to the defendants,—that Walker was the general agent, or husband of the boat, and Stone was the captain; that Walker applied for the insurance; that the sum insured was \$5,000, and the insurance was for the term of one year; that the policy was issued to Walker, on account of whom it might concern, the loss (if any) payable to Walker; that the custom of the company, in insuring steamboats for a year, was and is to take the note of the person applying for the insurance for the premium, due at six months, for the purpose of closing the account on the books of the company; and that the note of Walker, endorsed by Stone, negotiable and payable at the Southern Bank, was given for the premium." Copies of the policy and note are appended to the bill of exceptions; and it is further stated, that "the note and policy bear the same date, but were not executed until two or three days after the contract to insure was made; and that the note given for the premium had not been paid, but was protested for non-payment, and was produced on the trial and offered to the defendants."

The court charged the jury as follows:—

"1. That they must be satisfied that said steamboat was the property of the defendants, and that while running her the indebtedness for work, &c., was incurred by them, or for their benefit, and with their knowledge and consent, to au-

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thorize a recovery for that item; that as to the amount claimed for the premium, it was not sufficient that the defendants were owners of and running the boat, though they should be satisfied that the insurance was taken by Walker—they must be satisfied that the words ‘for account of whom it may concern’, referred to Stone and Mooring, and that Walker procured the insurance at their request, or that as the ship’s husband he procured it for their benefit, and that they knew of it, and assented to it; and that his being ship’s husband was not sufficient to show these facts.”

“2. That if they believed the defendants were all liable for the premium, then Stone and Mooring insisted that they were discharged by the company taking the note,—they insisting that it was taken in payment of the premium; that whether the note was taken in payment or not, was a question of fact for them to determine, but the taking of the note did not raise the presumption of payment; that they must take all the facts into consideration, and if they believed that the note was taken in payment of the premium, then the defence was complete as to that item; but if not, and they should find that the defendants owed the amount, they should find for the plaintiff.”

To this last charge the defendant Mooring excepted, and requested the court to instruct the jury, “1st, that one part-owner of a steamboat, as such merely, has not authority to insure the interest of his co-partners; and, 2dly, that if they believe the note, given by Walker and endorsed by Stone, was taken by plaintiff in payment of the premium, then plaintiff cannot recover of him for such premium: both of which charges were given by the court.”

The charge excepted to is now assigned for error.

E. S. DARGAN, for the appellant:

The court erred in instructing the jury that the taking of the note, under the facts disclosed by the evidence, “did not raise the presumption of payment.” It is true, where there is an indebtedness by account, and a promissory note is given therefor, that whether the account is paid then depends on the intention of the parties, as in the case in 10 Ala. 755; but where there is no indebtedness by account, and a promissory note is given at the time of the contract by which the

indebtedness arose, there can be no other presumption than that it was given in payment, or that the note was part of the contract, thereby excluding the idea of an account. If the charge can be sustained, then, in every contract of sale in which a note is given, the seller may abandon his note, and sue and recover on the account, unless the defendant can prove that the object and intent of giving the note was to prevent an account, or to pay it. But no case goes thus far ; on the contrary, they all agree that a note, executed at the time of the contract, for the purchase money or value of the thing sold, closes the transaction, and becomes the only evidence of the debt ; at least, this must be the *prima facie* intendment of the law.—French v. Price, 24 Pick. 13 ; 12 Johns. 409 ; 7 Mass. 43 ; 2 Greenl. Ev. §§ 519, 520, and the cases there cited.

The custom of the company is part of the contract of insurance, and the custom was to take a note at six months. The entire contract was, the insurance of the boat and a note at six months for the premium. If Walker had refused to give the note, the policy would not have been issued, unless the company departed from its established custom. In requiring a note at six months, the company, in effect, said, 'I will not credit you without your note ; I will not have an open account, my debt must be evidenced by note.' The custom makes the note a part of the contract, and was evidently intended to prevent accounts. This distinguishes the case at bar from all the other cases, except French v. Price, *supra*.

P. HAMILTON, *contra*, contended that the charge of the court was supported by all the adjudicated cases, except in Massachusetts and Maine, where the taking of a note is held *prima facie* evidence of payment ; but elsewhere something more is required to raise a presumption of payment ; and he cited the following cases : 11 Johns. 513 ; 14 *ib.* 404 ; 2 Gill & J. 493 ; 7 Har. & John. 92 ; 2 Hill's (S. C.) R. 528 ; 2 Bail. 574 ; 2 Richardson's Law R. 244 ; 9 Missouri R. 59-62 ; 7 Hill's R. 130 ; 3 Gill's R. 350 ; 8 Conn. 472 ; 5 Barb. (S. C.) R. 398, 408 ; 1 Hill's R. 516 ; 5 *ib.* 448 ; 10 N. H. 507 ; 15 *ib.* 335 ; 9 B. & C. 449 ; 7 Johns. 311 ; 6 Term R. 52 ; 7 *ib.* 64 ; 8 *ib.* 451 ; 6 H. & J. 166-70 ; Scott v. Myatt & Moore, 24 Ala. 494.



RICE, J.—The negotiable note of a debtor is not payment of a pre-existing debt, nor of a debt created at the time it is given, unless there is an *agreement* to receive it as payment. In the absence of any such agreement, if such note is not duly paid, and the creditor is ready to return it, he may enforce by action the original debt or consideration. In every such action, when the creditor at the trial produces such note, and offers to surrender it, the true question is, whether there was any agreement whatever to accept the note as a payment of the debt due to the plaintiff.—*Abercrombie v. Moseley*, 9 Por. R. 145; *Scott v. Myatt*, 24 Ala. 489; *Johnson v. Cleaves*, 15 N. H. 335; *The Patapsco Ins. Co. v. Smith*, 6 Harris & Johns. R. 166; *Elwood v. Deifendorf*, 5 Barb. Sup. Ct. R. 398; 7 Hill's R. 130; 9 Missouri R. 59; 3 Gill's R. 350; 2 Hill's (S. C.) R. 528; 2 Bailey, 574; 2 Rich. R. 244; 8 Conn. R. 472; 6 T. R. 52; 7 *ib.* 64; 8 *ib.* 451; 9 B. & C. 449; *Burden v. Halton*, 4 Bing. 454; *Rolt v. Watson*, 4 *ib.* 273; *Story on Prom. Notes*, § 104, 404.

Although such note is not *per se* a payment, nor received as payment, yet it may operate as a suspension of all right of action in the creditor until after it has become due and dishonored, and will amount to an absolute satisfaction, or extinguishment, of the original debt or consideration, under certain circumstances: thus, if it has been transferred by the creditor, and is outstanding in the hands of a third person. *Story on Prom. Notes*, § 405; *Black v. Zacharie*, 3 How. (U. S.) R. 483. But independent of the existence of any such agreement, or of any such circumstances, the taking of such note does "not raise the presumption of payment."

The charge of the court must be construed in connection with the evidence. The charge in the present case, thus construed, is not in conflict with the law as hereinabove pronounced. The clear and undisputed facts are, that the defendants are the owners of the boat insured,—that the note for the premium was taken "for the purpose of closing the account on the books of the company"; that before this suit was commenced, the note was protested for non-payment, and that on the trial, it was produced by the plaintiff and offered to the defendants. On these facts, there was neither error nor injury in that part of the charge which declared that "the



taking of the note did not raise the presumption of payment." 6 Harris & Johns. R. 166 ; 15 New Hamp. R. 335, *supra*.  
Judgment affirmed.

## WRIGHT vs. BOLLING.

[ACTION ON PROMISSORY NOTE BY PAYEE AGAINST MAKER.]

1. *Merchant's clerk may testify to what facts.*—A merchant's clerk and book-keeper, who testifies that he made all the entries on the books, and that he charged nothing as sold which was not sold, may further testify "that he is satisfied and believes that all the items charged in the defendant's account were sold, though he cannot recollect them."
2. *Admissibility of parol evidence as to facts dehors written.*—In a suit on a promissory note by the payee against a surety, who signed as co-maker with his principal, the defendant introduced evidence, to show a partial failure of consideration, that the note was given for the amount of a book account due from his principal to plaintiff, which was secured by a mortgage purporting on its face to secure the amount of the debt then due; that after the execution of the note and mortgage, the amount of this debt became a material question in a certain suit, in which plaintiff was examined as a witness; and that on his examination as a witness in said suit, he could only prove a portion of the items embraced in the account: *Held*, that plaintiff might rebut this evidence, by making proof of other items in the account for articles sold after the execution of the mortgage, but before the date of the note; and that such proof did not tend to vary or affect the terms of the mortgage, since the question at issue was whether the note was supported by a consideration, and not whether the mortgage operated prospectively or only secured the existing indebtedness.
3. *Mortgage—Contemporaneous parol agreement—Estoppel.*—A debtor by book account gave his creditor a mortgage, which purported on its face to secure only his present indebtedness; but there was a contemporaneous parol agreement that it should operate prospectively, so as to secure the account contracted during the remainder of the year. After the law-day of the mortgage, the debtor gave his note for the amount of the mortgage debt, with a surety as co-maker, to whom, in consideration of his signing the note, the creditor at the same time assigned the mortgage by written endorsement; and at the time of this transaction, the creditor stated that the debt due under the mortgage was the amount for which the note was given, but no book or account was produced, nor did the debtor say anything as to the amount of the mortgage debt: *Held*, that if the surety signed the note with a knowledge of the parol agreement, he could not defeat a recovery on the note by insisting that the mortgage only afforded him a partial indemnity;

and, on the other hand, that both his principal and the creditor were estopped from saying that the mortgage did not cover the entire amount for which the note was given.

4. *Charge referring question of law to jury, erroneous.*—A charge, the effect of which is to refer to the jury the decision of a question of law—*e. g.* whether the statement of a witness, which the court had admitted in evidence, was to be considered evidence—is improper and should be refused.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. CHARLES W. RAPIER.

THIS action was founded on a promissory note for \$82 46, executed by S. C. Benson and John S. Wright, dated April 18, 1854, and payable by the 25th December next thereafter, with interest from the 1st January, 1854, to John Bolling, or bearer. The defendant Wright, on whom alone the summons was executed, defended the suit, but the record does not state what the pleas were.

On the trial, as appears from the bill of exceptions, after the plaintiff had introduced in evidence the note declared on, the defendant offered in evidence, after proving its execution, a certain mortgage executed by said Benson to the plaintiff, dated April 28, 1853, conveying a wagon, nine oxen, and a growing crop of corn and potatoes to secure the amount of a book account then due and owing from said Benson to plaintiff. This mortgage contained a power of sale, the law-day being the 1st January, 1854; and on it was an endorsement, signed by plaintiff, in these words: "The 18th day of April, 1854, received note for the amount due me on the mortgage, and give it to John S. Wright to assign the note."

"The defendant also introduced a witness, who swore that the note sued on was given by defendant to plaintiff when said Benson was present; that Benson said nothing as to the amount of his indebtedness to the plaintiff, but plaintiff stated that Benson owed him under the mortgage the amount for which the note was given; that no book of accounts, or statement of the amount, was produced, and no items of the account mentioned; that the note, and the endorsement by plaintiff on the mortgage, were both made at the same time.

"The defendant also introduced a witness, who swore that on a previous trial between the State and said Benson, in

which the amount of Benson's indebtedness to plaintiff was a question, and after the assignment of the mortgage and making of the note, plaintiff was examined touching this indebtedness, and produced his books; and that all he could swear to was, one barrel of flour, worth \$9, and ten gallons of whiskey, worth \$5; that his clerk was called in to aid him in making out his account, and they both could not make out any more.

"Here the defendant closed his closed case; and thereupon the plaintiff introduced one Wren, who swore that, previous to the making of the note, he was present and saw plaintiff bid off a yoke of oxen and a wagon, at \$38, and pay the money for the same; that said oxen and wagon were sold at a constable's sale as the property of said Benson, and went back into Benson's possession. But this testimony, in reference to the oxen and wagon, was subsequently (and before the jury retired) excluded from the jury, on motion of the defendant.

"The plaintiff also introduced one McKellar, who swore that he was clerk for plaintiff in 1853, up to the 28th May of that year, and kept his books up to that time; and he proved on the books, which were produced and before the witness, in his handwriting, items of account charged against said Benson (in the handwriting of witness) to the amount of \$38; that while he was clerk as aforesaid, all that was sold from the store was sold by him, or within his knowledge; that he made no entries on the books of things as sold which were not sold; and that he was satisfied and believed that all those items were sold to said Benson, but he could only remember three articles as being sold to him—which were, one barrel of flour, at \$9: ten gallons of whiskey, at \$5; and one bottle of oil, at seventy-five cents. The defendant moved the court to exclude from the jury that part of the testimony of said witness in these words—that he was satisfied and believed that all those items were sold to said Benson' which he could not state from memory: but the court overruled the objection, the evidence went to the jury, and the defendant excepted.

"The *plaintiff* (?) also moved to exclude from the jury all the testimony of said witness, as to the items which he proved on the book, charged against Benson after the making of the mortgage, amounting to \$38; but the court refused to do so, the evidence went to the jury, and the defendant excepted.



“The plaintiff introduced one S. J. Bolling, who swore that, before the making of the mortgage, plaintiff and said Benson came to him to write the mortgage, and that they had a paper writing—whether a note, or memorandum of account, he could not recollect, but its amount was \$26. The plaintiff also introduced John Bolling, Jr., who swore that, after McKellar left in 1853, he was clerk for plaintiff; that Benson came there several times, and bought things on a credit, but the items or value he could not recollect, and he did not keep an account thereof. The plaintiff also introduced a witness, who swore that, when the mortgage was made, defendant was not present, and Benson said that it was intended to secure to plaintiff the payment of an account in his store for what he had got and expected to get afterwards during that year. Defendant moved to exclude from the jury the testimony of this last witness; but the court overruled the motion, and the defendant excepted.

“The court charged the jury, among other things, that if it was intended, at the time the mortgage was made, that it should operate as a mortgage security for such account as Benson had contracted in 1853, or might afterwards contract with plaintiff during that year, then his account with plaintiff during that year, both before and after the making of the mortgage, was secured by the mortgage; to which charge defendant excepted.

“The defendant asked the court to charge the jury,—

“1. That if they believed from the evidence that the consideration of the note sued on was the amount due by Benson to plaintiff under the mortgage, and that at the time the mortgage was made \$30 was all that was due by said Benson to plaintiff under the mortgage, then the amount of the note sued on for which the defendant would be liable, would be that sum, with interest from the first of January, 1854; which charge the court refused, and defendant excepted.

“2. That if they are satisfied from the proof that the note sued on was given for the amount which might be due from Benson to plaintiff under the mortgage; that plaintiff was only able to specify on the former trial an account against Benson amounting to one barrel of flour and ten gallons of whiskey, and that his clerk (McKellar), after looking at the



books, could only remember those articles and a bottle of oil as being sold to Benson; and there has been no other evidence as to the account, save the note in issue; then, if they believe all the balance of the evidence, they must find a verdict only for the amount of those articles, with interest from the first of January, 1854. This charge, also, the court refused to give, and the defendant excepted."

All the rulings of the court above stated are now assigned for error.

ELMORE & YANCEY, for the appellant:

1. It was not allowable to give parol evidence of the intention of Benson in executing the mortgage, so as to give Bolling a greater security than the instrument itself would give him. In a written instrument, the intention of a party is to be ascertained from the meaning of the words used in it, and from them alone; with this exception, that extrinsic evidence is admissible to enable the court to discover the meaning of the words used, and to apply them to the particular facts of the case.—2 Phil. Ev. 276. Though a mere money consideration may be shown to have been greater or less than stated in a deed, yet it is not admissible to give parol evidence of a consideration different from and inconsistent with the one stated.—Murphy v. Branch Bank, 16 Ala. 90. The parol evidence offered materially varied the written contract itself: the written contract was, that the sale of the property should be void on payment of an account then due; while the parol evidence added thereto the amount which might also become due at a future period.

2. It was erroneous to leave to the jury the question, what was the matter which the mortgage was intended to secure. It was the duty of the court to construe the instrument and declare its meaning.—2 Phil. Ev. (3d ed.) 278, and cases cited.

WATTS, JUDGE & JACKSON, *contra*:

1. The evidence of McKellar was competent. Whether it was sufficient ought to have been raised by a charge.—Bell v. Rhea & Co., 1 Ala. 83; Batre v. Simpson, 4 *ib.* 312.

2. The evidence showing the consideration of the mortgage was proper.

3. The first charge asked was erroneous, because it sought to confine defendant's liability on the note to the amount of Benson's indebtedness at the time of the execution of the mortgage; while the true question was, what was the amount of that indebtedness at the time of the execution of the note.

4. It needs no argument to show that the second charge asked was properly refused.

5. The charge given was certainly correct.—Robinson & Caldwell v. Mauldin, Montague & Co., 11 Ala. 980, and cases there cited.

6. The true question in the case was, not as to the validity of the mortgage between Benson and Bolling, but whether Benson owed Bolling at the time the note was executed. At that time Benson admitted his indebtedness to Bolling, in the presence of Wright; and Wright, being merely a surety, was bound by that admission, and became Benson's surety.

CHILTON, C. J.—1. There was no error in admitting the testimony of McKellar, to which exception was taken. The fact that the witness has no recollection of selling the other articles, makes no difference. He made the charges, and knows that they are correct, for he charged nothing that was not sold and delivered. He might, therefore, very properly state, that he was satisfied and believed the items so charged were sold to Benson, although he could not remember them.—1 Greenl. Ev. (5th ed.) § 437; 2 Ad. & El. 210; 2 Phil. Ev. (C. & H.) p. 551, note 421; Haig v. Newton, 1 Rep. Const. Ct. 423; *ib.* 373; Head v. Shaver, 9 Ala. 791.

2. A portion of the items charged on the books and proved by this witness were sold since the execution of the mortgage, but in 1853, and the defendant moved to exclude these; but the court allowed them to be proved, against his exception. This was correct. The proof tended to show a consideration for the note, and to rebut the proof offered by the defendant that the flour and ten gallons of whiskey were the only articles booked against Benson during the year 1853. The question is, not whether the mortgage shall stand as security for the items sold after it was executed, but whether the note is supported by a consideration. If Benson and Bolling agreed that the mortgage should secure the payment

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for articles sold by the latter after its execution, and the note was given in part consideration of such sale, the note will be supported, whether the agreement for security would be carried out or not, unless Bolling was guilty of a fraud in inducing Wright to sign the note, by some false assurance that the mortgage would secure him, when it would not. Nothing, however, of this kind is alleged, nor is any question of the kind raised. The proof was relevant and proper. Its sufficiency and effect were matters for the jury, under the charge of the court.

3. It appears that the note and the endorsement upon the mortgage were executed at the same time—are parts of one transaction. Benson, the principal debtor and mortgagor, was present, and a party to the transaction, for he executed the note. Although, by the terms of the mortgage, the account for the year 1853, existing at the time of its execution, was alone secured by it; yet, when it was made, Benson said it was intended to operate prospectively, so as to secure the articles to be purchased thereafter in 1853, as well as the book account then existing for that year. Under these circumstances, Benson executed his note for the amount which Bolling claimed to be covered by the mortgage, with the defendant Wright (we presume) as his surety; and in consideration of Wright's signing the note, Bolling, the mortgagee, transfers to him the mortgage, by the endorsement copied above. Now, if Wright signed the note with a *knowledge of these facts*, we know of no principle which would release him by reason of the fact that the mortgage only afforded him a partial indemnity. He has all the indemnity he contracted for, and has assumed to risk the compliance on the part of Benson with what, to say the least of it, amounts to a moral obligation, resulting from his promise to allow the mortgage to operate as a security for goods to be purchased after its execution in 1853. If, however, on the other hand, Benson recognized this obligation, and gave his note to Bolling for all the account of 1853 as secured by the mortgage; and as a part of the same transaction, the defendant Wright signed the note in consideration of the transfer of the mortgage to him, which transfer shows the note to be for the mortgage debt,—then, it is perfectly clear that both Benson and Bolling

are estopped from saying that the mortgage does not cover the entire demand.—See 1 Greenl. Ev. §§ 27, 184, 195, 196, 207, 208 ; Stone v. Britton, 22 Ala. 243–248, and cases there cited. In favor of the surety, the mortgage is to have the operation agreed upon by the creditor and principal debtor. If they have said that the note which they induced him to sign was for the mortgage debt, and that therefore the mortgage transferred to him was a subsisting indemnity in his hands to the amount of his liability which he is induced to incur in consequence of such indemnity, *as against them* it must so operate, there being nothing upon the face of the mortgage, or of the endorsement of it, inconsistent with such operation. It will be observed, the question whether the mortgage is a subsisting security, arises solely between the parties themselves—no third person or creditor intervenes to contest its operation.

4. It follows from what we have said, that the proof objected to was not only proper, as rebutting the evidence of want of consideration offered by the defendant, but tended to build up an estoppel as against Benson ; giving to the mortgage the effect of securing the whole note in favor of the defendant, as announced by the affirmative charge given by the court. This charge, when considered with reference to the testimony set out in the record, on which it is based, is unexceptionable.

5. The first charge prayed for by the defendant assumed that the mortgage only secured so much of the account of 1853, as had been contracted by Benson with Bolling before its execution, and that Wright was only liable for this sum. But we have shown that, under the proof, such was not its legal operation as respects the rights of this defendant. The charge pretermits the inquiry, whether the conduct and declarations of Benson and Bolling had not given to the mortgage a more extended operation, and, under the facts disclosed by the record, was improper.

6. The last charge asked by the defendant was properly refused, as it referred to the jury the legal question, whether what McKellar had said in reference to certain items charged by him on the books of Bolling, of goods sold to Benson by him, but the sale of which he could not remember, was to be



considered as evidence. The charge sets forth the items which this witness states he remembers to have sold, and says, "if there has been no other evidence as to the account save the note in issue, then, if they believe all the balance of the evidence, they must find a verdict only for the amount of those articles, with interest from January, 1854." This question of law the court had previously settled, and properly, adversely to defendant. Besides; all the proof is not set out, and there may have been proof which would have justified a recovery aside from the evidence contained in the charge. It is impossible to say whether a charge, predicated upon the whole proof, and which may or may not be proper as the proof may justify or forbid it, should have been given, in the absence of a knowledge of what the proof was. In such case, the party excepting must set out all the proof.

We are unable to perceive any error in the record prejudicial to the appellant. We thus qualify our conclusion, because, if the charge given be erroneous, it is upon the assumption that the defendant took the mortgage, and signed the note, with a knowledge that only part of the note was secured by it; in which event, the mortgage would be no criterion of his liability, and consequently the charge could not by possibility have worked any injury to him.

Judgment affirmed.

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### MAYS, ADM'R, &C., vs. WILLIAMS.

[ACTION ON NOTE GIVEN TO ADMINISTRATOR FOR MEDICAL SERVICES RENDERED BY HIS INTESTATE.]

1. *Construction of statutes prohibiting unlicensed physicians from practicing.*—The effect of the acts of 1823, 1826, and 1832. (Clay's Digest, pp. 487–8, §§ 2, 9, 10,) construed together, is to render void all bonds, notes, promises, &c., given or made to an unlicensed physician, in consideration of medical services rendered by him, unless his name has been enrolled in one of the medical boards of this State, or unless he practices on the botanic system only; and when suit is brought on a note, which is shown to have been given in con-

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sideration of medical services rendered, no recovery can be had, unless it is proved that the person by whom the services were rendered was not within the prohibition of the statute.

2. *Validity of contract determined by what law.*—The validity of a contract must be determined by the statute in force at the time it is made: if it is valid when made, a subsequent change or repeal of the law cannot impair its validity; and if it is void when made, no subsequent law can impart to it validity.
3. *Rules of evidence governed by what law.*—In all civil actions commenced since the adoption of the Code, although founded on contracts whose validity must be determined by the old law, the rules of evidence prescribed by the Code must govern.
4. *Preponderance of evidence in civil cases.*—In the absence of legal presumptions, it is for the jury alone to determine what amount of evidence is required to produce conviction in their minds; and a charge, which instructs them “that, in civil cases, all that is required is that the proof shall preponderate in favor of one party or the other, and that they must find according to the preponderance of the proof,” invades their province, and is therefore erroneous.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. JNO. GILL SHORTER.

THIS action was commenced in August, 1853, and was founded on a promissory note of which the following is a copy:

“\$89,75. One day after date, I promise to pay Robert L. Mays, adm'r, &c., the sum of \$89,75, for value received this March 13, 1851. (signed) Wilson Williams.”

The plaintiff sued on this note as administrator of Thomas J. Williams, deceased. The bill of exceptions states, that after the plaintiff had read the note in evidence, “the defendant proved by a witness, that said note was given entirely for a medical account contracted by defendant with plaintiff’s intestate in his lifetime, in the years 1850 and 1851, which account was found on said intestate’s books after his death; that when said note was given to plaintiff, the said medical account was given up to the defendant, and the note was handed by him to plaintiff; that at the time the said note was thus executed, and said account receipted and given up, defendant raised no other objection to the account than that it was too large, and, on being informed that plaintiff, as administrator of his intestate, could deduct no portion of said account, he then executed said note, and delivered it to plaintiff. Defendant further proved, that he had regularly served a notice on plaintiff, in pursuance of the statute in such case

made and provided (Clay's Digest, p. 491, § 42 ; Code, § 978), to produce the license or diploma of his intestate to practice medicine ; and it was admitted that plaintiff had notice to produce said license or diploma of his intestate, and that it could not be produced by him. There was no evidence before the jury, tending to show whether or not defendant, at the time he executed said note and took up said account, knew that said intestate had been practicing medicine in his family without a license or diploma. There was proof, that said intestate, during the period in which said medical account was made, practiced sometimes on the botanic system, as well as the old medical system ; and there was also proof that he bled, blistered with Spanish flies, and gave calomel to defendant's family, while rendering the medical services embraced in said account ; but there was no proof that said intestate, while said account was being contracted, ever practiced on the botanic system in the defendant's family.

" This was all the evidence in the cause adduced by either of the parties ; and on these facts, the plaintiff, by his counsel, requested the court to charge as follows :

" 1. That a notice to plaintiff to produce, on the trial of the cause, his intestate's license or diploma to practice medicine when the account in question was contracted, and after the note was given for it to plaintiff as his administrator, without raising the objection, at the time of the execution of the note, that said intestate had no license or diploma at the time the account was contracted, (if they believe these to be the facts,) presents no bar to plaintiff's recovery on said note, although he fails to produce the license or the evidence thereof, and that if no other defence against said note be made out to their satisfaction, they must find for the plaintiff.

" 2. That to entitle plaintiff to recover on said note, he is not bound to show that his intestate, when said medical account was made, had a license or diploma to practice medicine, although he had been notified to produce it.

" 3. That if they believe the whole evidence, they must find for the plaintiff the amount of the note, with interest from its maturity.

" These several charges the court refused to give, and to each refusal the plaintiff excepted.

"The defendant then asked the court to charge the jury,—

"1. That if they believe from the evidence that the note sued on was given for medical services performed by plaintiff's intestate, or for medicines furnished and sold, as prescribed by him as a physician, or for either of them, then plaintiff cannot recover if he practiced medicine as a botanic physician.

"2. That in civil cases, all that is required is, that the proof shall preponderate in favor of one party or the other, and the jury must find according to the preponderance of the proof.

"3. That, although the note, on its face, imports a consideration, yet, if the proof is so far satisfactory to their minds as to produce the preponderance that the note was given for medical services performed by plaintiff's intestate, or for medical services furnished as prescribed by him as a physician; and that said intestate, in his practice, used calomel, or any of the preparations of medicines sold, or bled his patients, or blistered them with Spanish flies,—then plaintiff cannot recover.

"These three charges were given by the court, as asked, and to the giving of each separately the plaintiff excepted."

The charges given, and the refusal to give the charges requested by plaintiff, are now assigned for error.

JAMES E. BÉLSEK, for the appellant, contended,—

1. That the statute in force at the time the account was contracted for which the note was given, must govern the sufficiency of the notice; that by the express terms of this statute (Clay's Digest, p. 491, § 42), the notice must be given to the physician by whom the services were rendered, and therefore his administrator could not be required to produce it.

2. That inasmuch as the note was given, not to the physician himself, but to his administrator, and given without objection, the case is taken out of the operation of the statute and decisions cited for the appellee.—*Gilmer v. Ware*, 19 Ala. 252.

RICHARDS & FALKNER, *contra*, cited Clay's Digest, pp. 487, 491, §§ 1, 2, 42; Code, § 978; *Holland v. Adams*, 21 Ala. 680; *Allcot v. Barber*, 1 Wend. 526.



GOLDTHWAITE, J.—If the note sued on rested on a valid consideration at the time it was given, it would impose an obligation on the maker, the force of which it would be beyond the power of the legislature to impair; but the act of 1823 not only prohibits the practice of physic or surgery by unlicensed physicians, but expressly provides that all bonds, notes, promises, and *assumpsits*, made to any person not licensed in the manner thereafter specified, the consideration of which shall be for services rendered as a physician or surgeon prescribing for the cure of diseases, shall be utterly void.—Clay's Dig. 487, §§ 1, 2. Subsequent acts conferred the right on any physician, who had graduated at any regular medical university, to enrol his name with any of the medical boards of the State on the production of his diploma.—Clay's Dig. 488, § 9. By force of these statutes, medical services rendered by a physician who had not been licensed, or whose name had not been enrolled in a medical board of this State, formed no valid consideration for a contract of any kind; and as a necessary consequence, a note based upon such services would not be recoverable. The act of 1832 (Clay's Digest, 488, § 10) repealed the sections of the act of 1823 to which we have referred, as to physicians practicing on the botanic system; but our understanding of the last act is, that it applied to those who confined their practice to that system only. Indeed, the proviso shows conclusively that such was the intention of the legislature, as any botanic physician who administers calomel and certain other medicines in use with the regular faculty, is expressly subjected to all the penalties of the former acts.

The effect of these statutes, taken together, was to prohibit all persons from practicing as physicians, unless they were licensed by a medical board in this State, or their names were enrolled according to the provisions of the statute to which we have referred, or unless they practiced on the botanic system alone; and the necessary result of this prohibition would be, to prevent a recovery in all actions founded on contracts for medical services, unless it was proved that the persons rendering such service were not within the prohibition. The repeal of the law by the adoption of the Code did not give validity to the contract, if it was void under the old

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law.—*Milne v. Huber*, 3 McLean, — ; *McKissick v. McKissick*, 6 Humph. 75 ; *Mitchell v. Doggett*, 1 Branch (Fla.) 356.

But although we must look to the law in force at the time the note was given, to determine its validity and effect, in relation to the evidence which governs a suit upon it a different rule obtains. If the suit was commenced since the adoption of the Code, the rules of evidence which it prescribes must govern in all civil causes ; and although, under section 978, the plaintiff is not required to prove a license, except upon two days notice by the opposite party that such proof will be required, yet, if such notice is given, it devolves upon him, whenever it is established that the contract sued upon was for medical services, to show that he is outside of the prohibition ; and this he can do by proving his license, or that he was enrolled in the medical board, or that he practiced on the Thompsonian system only.

Applying these rules to the charges requested on the part of the plaintiff below, there was no error in their refusal.

The charge, however, which asserted that the note was not recoverable if given for medicines furnished or sold by the intestate, cannot be supported. It is true that section 980 of the Code operates as a prohibition upon the sale of drugs unless a license is obtained ; but no such law was in force at the time the note was given, and if the consideration was then valid, it could not, as we have said, be affected by any subsequent statute.

We think, also, that the court laid down the law too broadly, when it instructed the jury that, in civil causes, they were bound to find according to the preponderance of the testimony. Whatever facts are necessary to be established—whether by the plaintiff, to give him a right to recover, or by the defendant, to sustain his defence—must be proved ; and although, from the nature of things, it is impossible to say what degree or quantity of evidence amounts to proof, as it must necessarily depend upon the effect it has upon the mind (1 Greenleaf on Evidence, § 2), yet it will scarcely be denied that it would be unjust to charge a defendant with a heavy debt, when the preponderance of the evidence merely inclined the mind of the jury to the side of the plaintiff ; or to mulct a man in heavy damages, when the

evidence, although it preponderated against him, left the minds of the jury in a state of great doubt and uncertainty whether he was the person who committed the act complained of. We have high authority to sustain us in saying that, in such cases, a mere preponderance of evidence might not be sufficient.—Stark. Ev. (4 Amer. edit.) 451, 452. Much, of course, depends upon the nature of the fact to be established, and in most cases the amount of evidence required would vary as the fact was more or less improbable in itself; but no matter what might be the preponderance of testimony, if it failed to produce a rational belief in the minds of the jury as to the existence of the fact, it could not in any sense be said to be proved. We can suppose many cases where evidence would be admissible, as tending to prove facts, which would scarcely be sufficient to generate the lowest degree of belief; and if no evidence was offered by the other party, the fact could not, for that reason alone, be regarded as established. There can, as we have said, be no definite standard as to the quantity of testimony. In the absence of legal presumption, it is for the jury alone to determine upon the amount of evidence required; and the court invades their province, when it lays down an arbitrary rule, which, if followed, would force them to determine the existence of facts against their convictions as produced by the evidence.

For the errors we have noticed, the judgment must be reversed, and the cause remanded.

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## MATTHEWS, ADM'R, &C., vs. DOUTHITT AND WIFE.

[CITATION TO ADMINISTRATORS TO COMPEL FINAL SETTLEMENT.]

1. *Administrator de bonis non cannot be appointed until office vacated by his predecessor.*  
After the grant of letters of administration to a person entitled to and capable of discharging the trust, the probate court has no power to make any new appointment to the office until it is vacated, either temporarily or permanently, by the death, resignation, removal, &c., of the first administrator;

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such new appointment before the office is vacated is totally void, and confers no authority on the person appointed to have the first administrator cited to make final settlement.

2. *Final decree, rendered within eighteen months after grant of letters, and discharging administrator from further liability, void.*—If an administrator, after qualifying under a regular appointment by the probate court, has never resigned, and has not reported the estate either solvent or insolvent, a final decree, rendered within eighteen months after his appointment, that he “go hence discharged from further liability as such administrator,” is utterly void—it neither affects his rights or liabilities as administrator, nor authorizes the appointment of an administrator *de bonis non* of the estate.
3. *Whether such decree is of any validity as confirming and allowing administrator's accounts.*—Such a decree, if admitted to be valid so far as it confirms and allows the administrator's accounts (as to which, *quære?*) cannot be conclusive beyond the very items mentioned in the account, nor protect the administrator from liability as to all other matters.

APPEAL from the Court of Probate of Franklin.

IN the matter of the estate of John Snow, deceased.

The record shows that, on the 20th November, 1851, letters of administration were granted by said court to Cynthia D. Snow, the widow of said decedent; that on the same day appraisers of the estate were appointed, who subsequently returned an inventory of the estate, showing personal property to the amount of \$42 10, and an order of sale was at the same time granted to the administratrix; that at a special term of the court, held on the 25th September, 1852, the administratrix made application for a final settlement, and filed her accounts and vouchers, and that thereupon an order was made directing publication for forty days, and appointing a guardian *ad litem* for the infant distributees; that the proceedings were regularly continued, from term to term, until the regular January term, 1853, when the following decree was rendered:—

“This being the day to which was continued the final settlement of Cynthia Snow, administratrix of the estate of John Snow, deceased, came the said administratrix, and Rebecca Snow, infant daughter of said decedent, by her guardian *ad litem*: and it appearing to the satisfaction of the court that publication for forty days has been made, by posting up written notices at the court-house door and three other public places in said county, requiring all persons interested in said settlement to be and appear before the judge of this court,



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and show cause (if any they can) why said settlement should not be made ; and the judge of said court, having examined, audited, and stated said account, reported the same for allowance ; from which it appears that said administratrix has charged herself with the sum of \$52 70, and is entitled to credits amounting to \$52 70, disbursing all that has come into her hands as such administratrix ; and there being no exceptions made to said account, or any part thereof, so stated, it is ordered, adjudged, and decreed, that the same be in all things confirmed and allowed, and that said administratrix go hence discharged from further liability as such administratrix."

Afterwards, at the regular April term, 1853, it was "ordered by the court, that A. C. Matthews, sheriff of said county, be, and he is hereby, appointed administrator *de bonis non* (by virtue of his said office) of the estate of John Snow, deceased, and that letters of administration issue to him accordingly." At the March term, 1854, said Matthews, as administrator *de bonis non*, filed his petition in said court, asking a citation against said administratrix, who was alleged to have intermarried with James Douthitt, to compel a final settlement of her administration ; and a citation was accordingly issued to said Douthitt and wife. At the term to which this citation was returnable, the defendants appeared, and pleaded the decree above recited as a final settlement ; and on their motion the court dismissed the petition, and rendered judgment for costs against said administrator *de bonis non* individually. This decree is now assigned for error.

R. S. WATKINS, for the appellant.

J. W. SHEPHERD, *contra*.

RICE, J.—The doctrine of the common law, in force in this State, is, that when the Probate Court has granted letters of administration to a person entitled to and capable of discharging the trust, it cannot make any new appointment of an administrator of the same estate, until the occurrence of one of those events or disabilities which, either temporarily or perpetually, vacates the office—as the death, or resignation of the party, the repeal of his authority, &c. If it makes any such new appointment before the occurrence of any one of

such events or disabilities, such new appointment is totally void.—Griffith v. Frazier, 8 Cranch, 9 : The Justices v. Selman, 6 Georgia R. 432.

Where an administratrix has been duly appointed by a probate court in this State, and has qualified under such appointment, and has never resigned, and has not reported the estate either solvent or insolvent, a decree rendered by that court within eighteen months from such appointment, "that said administratrix go hence discharged from further liability as such administratrix", is utterly void.—Enicks and Wife v. Powell, 2 Strobhart's Eq. R. 196. It does not destroy or abridge her rights or liabilities as administratrix, nor authorize the appointment of an administrator *de bonis non* of the same estate. If she has received assets for which she has not duly accounted, or which she has not duly administered, she may be proceeded against in that court precisely as if no such decree had ever been rendered. If since her appointment as administratrix she has married, the proceedings ought to be against her and her husband as administrator and administratrix of the estate.—McGinty v. Mabry, 23 Ala. 672 ; 2 Wms. on Ex'rs, 632-633 ; Pistole v. Street, 5 Porter's R. 64.

Whether that part of the decree in the present case which *confirms and allows the account of the administratrix* as shown in the record, is of any validity, we do not now determine. If it be valid for any purpose, it cannot be conclusive beyond the very items mentioned in that account, and cannot protect her from liability as to all matters not mentioned in the account.

The administratrix in chief has not been displaced, nor has she resigned. The record does not show anything which amounts to a repeal of her authority, nor to a bar to her liability for matters not mentioned in the account above referred to, even if it be conceded that she is protected to the extent of the items mentioned in that account.—Gayle v. Elliott, 10 Ala. 264 ; Norman v. Norman, 3 Ala. 389.

The plain result from what we have said, is, that the appointment of the appellant as administrator *de bonis non*, is void,—that he has not thereby acquired any rights as administrator, and that there was no error in dismissing *his* petition.

The decree is affirmed.

## CRUMP ET AL. vs. WALLACE.

[TRESPASS TO TRY TITLES—MOTION TO DISMISS APPEAL.]

1. *Acknowledgment of security for costs held sufficient.*—Security for the costs of the appeal, though given by only one of the appellants, is as good as if given by all, since it covers all the costs of the appeal; therefore an acknowledgment of security “for the costs of an appeal by all the plaintiffs except R.”, is sufficient.
2. *Death of one of several co-plaintiffs before suit brought, in trespass to try titles, defeats entire action.*—The rule which obtains in ejectment, that the death of one of several lessors of the plaintiff does not abate the suit, nor destroy the right of the survivors to proceed, does not apply to the action of trespass to try titles, which must be brought in the name of the real parties; but in the latter action, the death of one of several co-plaintiffs before suit brought, defeats the entire action, and may be pleaded either in abatement or in bar.
3. *Provisions of Code allowing amendments as to parties do not apply to actions pending when it took effect.*—The provisions of the Code allowing amendments as to parties (§ 2403) cannot be applied to suits which were pending when it took effect—to-wit, on the 17th January, 1853; and under the old law, where one of several co-plaintiffs was dead at the commencement of the suit, there was no authority for dropping his name at any subsequent stage of the proceedings.

APPEAL from the Circuit Court of Shelby.

The record does not show the name of the presiding judge.

TRESPASS TO TRY TITLES, as also to recover possession of a tract of land lying in Shelby county, which the plaintiffs claimed as heirs-at-law of Francis Shrader, deceased; George Reeves and Rutha, his wife, being named in the writ and declaration as two of the plaintiffs. The defendant pleaded, 1st, not guilty; and, 2dly, that George Reeves, one of the plaintiffs in this suit, was dead at and before the commencement of the suit. The plaintiffs demurred to the second plea, but their demurrer was overruled; and they then replied, “that said George Reeves had no interest in the land sued for, and that he was, up to the 12th May, 1850, when he died, the husband of Rutha Reeves, and was made a party only because he was at that time supposed to be alive, and the husband of said Rutha, who (it is averred) is a part owner of the land sued for, and was at the commencement of the suit.”

The court sustained a demurrer to this replication, and the plaintiffs were thereupon forced to take a nonsuit, with leave to move to set it aside in this court; and they now assign for error these rulings of the court.

The clerk certifies, in his final certificate appended to the transcript, "that an appeal was taken by the plaintiffs in this cause"; and the sureties for the costs of the appeal acknowledge themselves "securities for the costs of an appeal in said cause by all the plaintiffs except — Reeves." It appears that the appellee, on these facts, moved to dismiss the appeal, or to strike the case from the docket; but the motion is not entered on the motion docket, and does not anywhere appear on the records of the court.

MORGAN & MARTIN, for the appellants :

1. The declaration shows that George Reeves and his wife were joined as plaintiffs, which could only be done where the suit was to recover her lands. The wife represented the real interest, and on the death of her husband might sue alone; or, since she sued jointly with him, the suit survived to her on his death.—Bright on Husband and Wife, vol. 1, p. 64; 2 Strobb. L. 332.

2. Since George Reeves was dead at the commencement of the suit, and there was no interest in him to survive to any one, the introduction of his name on the record could produce no legal consequences, where the actual parties in interest were all able to proceed with the cause. Such an error was amendable at common law.—Chitty's Pleadings, vol. 1, p. 14; Carolina Law Repository, vol. 1, p. 84.

3. At most, the death of one of several co-plaintiffs before suit brought, even where (if living) he would have been a necessary party, can only be taken advantage of by plea in abatement.—9 Gill & J. 428; 1 Chitty's Pl. (9th Amer. ed.) p. 447; Graham v. Houston, 4 Dev. Law R. 238; 3 Scam. 507; Bonner v. Greenlee, 6 Ala. 411.

4. One or more joint tenants may sue separately in ejectment, or in trespass to try titles, or in trespass *quare clausum fregit*, without noticing the other parties in interest; and if one of the lessors of the plaintiff dies, or is stricken from the demise or declaration, the suit does not abate, but proceeds in



the name of the remaining parties.—9 Pick. 528; 7 Greenl. 421; 2 H. & J. 280; 2 H. & M. 614; *ib.* 345; 8 Johns. 403; 12 *ib.* 185; 4 Gill & J. 323; 1 B. Mon. 370.

5. The action of trespass to try titles, having been substituted by statute for the action of ejectment, must be co-extensive with it. The plaintiffs in trespass occupy the position of John Doe in ejectment: in them concentrates all the title of the lessors of the plaintiff in ejectment, and they may recover upon any title, joint or several.—11 Wend. 592; 4 Cranch, 164; 1 Hawks, 469; 1 Johns. Cas. 392; 3 John. 259; 2 Port. 480; 8 *ib.* 317; 3 Ala. 73; 6 *ib.* 411; 7 *ib.* 459.

6. On the motion to dismiss the appeal:—The acknowledgment of the securities for the cost is clearly sufficient: their liability is not limited to the costs incurred by a portion of the appellants, but covers all the costs of the appeal; and the superadded words merely describe the appeal as being taken “by all the plaintiffs except — Reeves.”

#### WHITE & PARSONS, *contra*:

1. The appeal must be taken in the name of all the parties to the suit.—Clarke v. West, 5 Ala. 117; Savage & Darrington v. Walsh & Emanuel, 24 *ib.* 293; Moore v. McGuire, 26 *ib.* 461. Here, the acknowledgment of the sureties for the costs is for the costs of an appeal taken by all the plaintiffs “except — Reeves”; while the record shows that two of the plaintiffs bear the name of Reeves. How can it be ascertained which of the two was meant? A surety is entitled to stand on the precise terms of his contract.—Carey v. McDougald’s Adm’r, 25 Ala. 109.

2. The death of George Reeves before the commencement of the suit was good matter either in abatement or in bar.—Jenks v. Edwards, 6 Ala. 143; Baker v. Chastang’s Heirs, 18 *ib.* 421; 1 Watts & Ser. 438; 1 Chitty’s Pleadings, pp. 446, 466, 475.

CHELTON, C. J.—1. The motion to dismiss the appeal, or to strike the cause from the docket, cannot prevail. True, the security for the cost, which forms the ground of the motion, is not very formal, but it embraces the cost of the appeal; and although it says, “for all the plaintiffs except — Reeves”

it is sufficient, since security given for the cost of the appeal by one appellant, is as good as if given by all. The specifying of the person for whom the parties to the bond stand surety for the cost, is but a designation of their principals, to whom they would have the right to look for indemnity, should they have the cost to pay.

2. In actions of ejectment, the death of a portion of the lessors of the plaintiffs does not abate the suit, nor destroy the right of the survivors to proceed.—Adams on Ej. 320; 1 Wend. 27; 8 Johns. R. 495; Baker v. The Heirs of Chastang, 18 Ala. 417. The suit, being in the name of John Doe, a fictitious person who cannot die, progresses; and it is within the discretion of the court to allow amendments in stating the demise. But this fiction, of proceeding in the name of an unreal plaintiff, does not, and cannot, apply to the action of trespass to try title, where the suit is brought in the name of the real party, who must be able to sue, or he cannot maintain it.

In the case before us, several sue, but one of the plaintiffs was dead before the commencement of the action. As death has interposed a perpetual bar to his being a party in court, the fact of his decease may well be pleaded as it was in this case, and is not necessarily pleadable in abatement only. But the question recurs, does it operate only to bar a recovery on the part of the deceased, or as a bar to the entire action?

This action is governed by the same rules (the fiction and consequences which result from the fictitious proceedings aside) that obtain in the action of ejectment. When, therefore, several parties unite in an action, they are supposed and must be considered as relying upon a joint demise, and must allege and prove that each has the right to recover. In such case, all must recover, or none of them can.—1 Mar. R. 41; 2 *ib.* 242, 387, 459; 3 *ib.* 19, 379, 462; 4 Mon. R. 365; 7 *ib.* 230; Litt. Sel. Cas. 420; Hall and Wife v. Holcomb, 26 Ala. 720. It is well settled, in ejectment, that on a joint demise none can recover without proving title in all. As it is impossible to prove title in all the parties plaintiffs, one of them being dead before the action was commenced, the plea of such death must be a bar to the suit. That such a plea is a bar to an ordinary action, see Jenks v. Edwards, 6 Ala. 143, and cases there cited.

The fact that co-heirs may each maintain an action for his share, or may join, and if one die, the suit may proceed in the names of the survivors, may be granted, without at all affecting the position above asserted. Here there is a party introduced upon the record, at the inception of the proceedings, who cannot sue; and we know of no rule of law which will authorize his name to be dropped from the list of the complainants, so long as there is no change in the circumstances existing when the action was commenced. The new Code makes provision for amendments as to parties; but this suit was commenced under the old law existing before the Code, and must be controlled by that law.

It follows from what we have said, that the plea of the death of George Reeves *before suit* brought, was good as a bar to the action; and the replication that he had no interest, but was made a party because he was the husband of Rutha Reeves, another plaintiff, who is the party really interested, and under the supposition that he was living when the suit was commenced, was properly held bad on demurrer.

Judgment affirmed.

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### HUSSEY vs. ROQUEMORE.

[ACTION ON NOTE GIVEN FOR PURCHASE MONEY OF LAND.].

1. *Discharge of note by subsequent parol agreement.*—A parol agreement between vendor and vendee, made on discovering that the vendor had no title to a portion of the land conveyed, to the effect that the vendee should be discharged from the payment of the balance due on the note, unless the vendor made him a good title to that portion of the land within a reasonable time, is valid, and constitutes a good defence to an action on the note to recover the balance.
2. *Retention of possession by vendee.*—If the vendee retain the possession of the land under the contract, this might operate as a waiver or extension of the time for the delivery of the deed; but if he abandon it within a reasonable time, the note cannot be enforced against him, even though he retain the possession of the other portions.
3. *Measure of damages.*—The damages resulting from the failure of the vendor

- to make title to the land being uncertain, and the difference between the value of the land and the balance due on the note being slight, the agreement is not in the nature of a penalty, which would only entitle the vendee to scale the note to the amount of the actual value of the land; but discharges him, if titles are not made, from the entire balance due on the note.
4. *Estoppel cannot arise from promise made on Sunday.*—A promise made on Sunday to pay the balance due on a promissory note, against which the promisor has a valid defence, even if made under circumstances which ordinarily would estop him from setting up that defence, is void under the statute, and has no binding effect.
  5. *Promise to make deed not performed by tender of another's deed.*—If the vendor, on discovering that he has no title to a portion of the land, promise to "make a valid deed" thereto, the vendee is not bound to accept the deed of a stranger, which, though it conveyed a good title, might yet involve the trouble and expense of an inquiry to ascertain its validity: he has a right to stand on the terms of his contract.
  6. *What is reasonable time.*—A promise made on the 8th December, 1849, to make titles "within a short time" thereafter, is not complied with by tendering a deed "after the 13th October, 1851," and after the vendee had abandoned the land.
  7. *Primary and secondary evidence of deeds.*—Parol evidence cannot be received to prove the existence of title to land by patent or deed, until the proper predicate is laid for its introduction.
  8. *Non-residence of grantor not sufficient to authorize secondary evidence of deed.*—In a suit to which the grantee is a party, the non-residence of his grantor, of itself, does not authorize the introduction of secondary evidence to prove title in the grantee under the deed: the presumption being that the deed is in the possession of the grantee, he must be notified to produce it, or its loss or non-existence must be established, before resort can be had to inferior evidence.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. JNO. GILL SHORTER.

ASSUMPSIT by John J. Hussey against Vinson P. Roquemore, on a promissory note for \$300, dated August 2, 1847, and payable to the plaintiff on or before December 25, 1849; on which was endorsed a credit of \$225, dated December 8, 1849. The only plea was the general issue, with leave to give any special matter in evidence.

On the trial, as appears from the bill of exceptions, after the plaintiff had read in evidence the note declared on, the defendant introduced two witnesses, who testified to the following facts: That the plaintiff admitted to the defendant, in their presence, after the execution of said note, that it was given in part payment of a tract of land sold by him to defendant on the day of its date, at the price of \$600 for the



whole tract ; that he also admitted to defendant, in the same conversation, "that he had sold him all the land down to a certain boundary line, running six feet south of a certain fence and parallel to it, and that the fence was embraced within the purchase, and stood outside of the boundary line"; that on the 8th December, 1849, in their presence, defendant paid plaintiff \$225 on said note, and that plaintiff at that time agreed with defendant, that he should not pay him the balance due on said note, unless he (plaintiff) executed to him (defendant), within a short time, a valid deed for a slip of land between the true boundary line and the line designated in the purchase and sale, and that if this was not done, defendant was to be discharged from paying the balance of said note, and said note was to be void for the balance ; that there was a fence very near the line of the quarter-section of land, but mostly on the south side of the line ; that at the time said payment was made on said note plaintiff agreed that defendant should have said quarter-section of land surveyed, and if it was ascertained on survey that the line of said quarter-section did not reach six feet south of said fence, then plaintiff should not demand of defendant the balance due on said promissory note ; that said survey was made by a competent person, and the line run by the surveyor left the said six feet out of the said quarter-section of land, and also the greater part of the said fence ; that after this, defendant built another fence, north of the first-named fence and on the said quarter-section of land sold to him by plaintiff, and left said first-named fence and said strip of land outside of the enclosure ; that a part of said slip of land, which contained in all from one to eight acres, had been cleared, and a part had not been cleared ; that defendant never again touched the said fence, nor interfered with it or said slip of land in any way, but kept the possession of the balance of said land ; that said fence, when new, would have been worth about \$75, but it had been standing something like six years before the trial of this cause, and was old and worth but little when given up by defendant ; and that said slip of land, as it was, would have been worth about \$8 per acre.

"Plaintiff then proved, by way of rebuttal to defendant's testimony, that defendant had possession of the tract of land

in which said slip of land was, for two years from the commencement of the year 1850 ; that he and witness agreed in the years 1848 and 1849, that they should repair the first-named fence and let it remain the dividing fence between them ; that they did repair said fence, according to said agreement, and cultivated under it the two years mentioned,—the field of witness being on the quarter-section south of the fence, and embracing the six feet south of the fence, and that of defendant being on the adjoining quarter-section north, purchased by him from plaintiff ; that witness told defendant, in the conversation in which said agreement was made, that he had no claim to said six feet of land, nor to said fence ; and that said slip of land was worth about \$3, and said fence was worth nothing. Plaintiff here offered to prove by said witness, that he (witness) had a patent from the United States Government, and a deed for said land from the true owner ; but said patent and deed not being produced on the trial, and their absence not being accounted for, the court excluded the testimony, and the plaintiff excepted.

“Plaintiff also offered to prove by said witness, that he (witness) was the owner of the tract of land on which said slip of land and first-named fence were, and that before defendant erected said second fence and abandoned said first fence, he (said witness) tendered to defendant, at the request of plaintiff, a deed in his (witness) own name for said slip of land, with said first fence ; but the defendant objecting to the testimony, and no deed being produced or accounted for, the court, on defendant’s motion, excluded it, and plaintiff excepted.

“Plaintiff next offered another witness, who proved, that he was plaintiff’s agent to tender to defendant a certain deed”, which is made an exhibit to the bill of exceptions, dated October 13, 1851, signed by said plaintiff and wife, and conveying to defendant the said piece of land above described ; “ that he did tender said deed to defendant after the 13th October, 1851, and after defendant had abandoned the land and fence ; and that defendant refused to accept it, knowing witness to be plaintiff’s agent for that purpose. But the court, on the defendant’s objection, excluded said deed from the jury, and the plaintiff excepted.

“Plaintiff next offered to read in evidence, after proof of the non-residence of plaintiff, a recorded copy of a deed from plaintiff to defendant, with all the entries thereon, to show that the land which was purchased by defendant from plaintiff in the first instance, and which corresponded in numbers with the proof of a witness in the cause, and which only called for one quarter-section of land, was thus purchased by the Government surveys, and not by a given number of acres; but the court, on defendant's motion, rejected the copy deed, because the absence of the original deed was not accounted for, nor the execution of the original deed proved; and to this ruling of the court plaintiff excepted.

“Plaintiff further proved, that, after said promissory note fell due, a witness, who was plaintiff's agent to collect from defendant the balance due on said promissory note,” (*had an interview with defendant in relation to it?*) “that defendant, at this interview, refused to pay the balance due on said note; that this interview was had after the erection of defendant's new fence, and after the conversation between plaintiff and defendant in which, as defendant's witnesses stated, plaintiff agreed to make a deed to said slip of land within a short time thereafter, or to surrender the balance due on said promissory note; that defendant, at this interview, when informed by witness that he was plaintiff's agent to collect said note, and that said note would be sued to the first court of Russell county after it fell due, still refused to pay the balance due on the face of said note; that afterwards, on Sunday, at a meeting-house in Russell county, defendant did agree with witness to pay the balance remaining due and unpaid on said note, to the plaintiff when he should come out, if he (witness) would agree on the part of plaintiff that it should not be sued to the first court after it fell due, and that he (witness) might write to plaintiff, who then resided in Georgia, to that effect; that witness, as plaintiff's agent, did accordingly agree with defendant, and write to said plaintiff after said Sunday conversation, and stated about it, and that plaintiff assented to the arrangement; that said note, in consequence of defendant's said promise thus to pay it, was not sued by witness, as plaintiff's agent, to the first court after it fell due, but the term passed by before plaintiff was heard from on this point;

that plaintiff came from Georgia to Alabama, after said first term of the court had elapsed, to receive from defendant the balance due on said note, and that defendant refused to settle it with him.

“This was all the evidence; and upon this state of facts, the plaintiff asked the court to charge the jury as follows:—

“1. That defendant could not resist the payment of the balance due on said promissory note, in a court of law, while in possession of the land. This charge the court gave, but with this qualification: “That if the jury believed from the evidence, that plaintiff sold to defendant the land in controversy, down to a fixed boundary, as his own, and afterwards agreed with defendant that, if he (plaintiff) did not execute to defendant a deed for said slip of land within a reasonable time thereafter, defendant should be discharged from the payment of the balance of said promissory note; and that a reasonable time had elapsed since said *promissory note* (?) was made, in regard to the deed for said slip of land, and plaintiff had not made said deed; and that defendant had abandoned said slip of land and first fence, and had not interfered with either since; and that this was done prior to the commencement of said plaintiff’s suit,—then plaintiff could not recover, even though defendant kept possession of the balance of the land’; and to this qualification plaintiff excepted.

“2. That the true measure of damages, in such a case as the present, was not the amount stipulated to be lost on said note by the plaintiff, in case he did not make a deed to defendant for said slip of land within a short time after he promised to do so, but the loss he sustained in not procuring the title to said strip of land, comparing its value with that of the other portions of the land sold by plaintiff to defendant; which charge the court refused to give, and the plaintiff excepted.

“3. That if they believed from the evidence, that plaintiff sold to defendant, in the first instance, a quarter-section of land which he did own, and a slip of land six feet in width and the extent of a quarter-section in length, which he did not own at the time of the contract or afterwards; and that defendant, after the purchase, got possession of all the land then sold, and afterwards paid plaintiff all the purchase money



that he had agreed to give for said land, except the balance due on the note sued on ; and that plaintiff then agreed to make defendant a deed for said slip of land, with the appurtenances thereon, within a short time after said agreement, and that if he did not do this, the balance of said note was to be considered as paid, in lieu of said deed for said land ; and that plaintiff did not execute said deed within a short time after said agreement ; and that defendant left said slip of land out of his enclosures, and also said first fence, and did not afterwards assume ownership over either, but still retained possession of the other portions of the land ; and that the land thus to be conveyed was not worth more than five dollars, and the fence worthless,—then defendant could not recover upon said note the balance due thereon as stipulated damages, but the true measure of damages was the injury he had sustained in not obtaining said fence and slip of land. This charge, also, the court refused to give, and the plaintiff excepted.

“4. On the evidence in the cause showing a forbearance to bring suit on the note to the first court after it fell due, on defendant's promise to pay it to plaintiff's agent, the court charged the jury, that even if they believed the whole of the evidence on this point, it did not amount to an estoppel against defendant to set up any defence against the payment of the balance due on said note which existed anterior to the making of said promise ; and to this charge, also, plaintiff excepted.”

The rulings of the court on the evidence to which exceptions were saved, the charges given, and the refusals to charge as requested, are now assigned for error.

JAS. E. BELSER, for the appellant.

SAMUEL F. RICE, *contra*.

GOLDTHWAITE, J.—The qualification to the first charge given by the court, involves the question of the validity of the agreement made between the parties as to the note sued on. The evidence proved that this note, which was for \$300, was originally given for land bought by the defendant from the plaintiff ; that the latter, discovering he did not own a

portion of the land sold, agreed with the vendee, on receiving from him \$225 on the note, that he should be discharged from the payment of the balance, unless he executed to him a valid deed for such portion within a short time thereafter ; that no such deed was executed for nearly two years, and that thereupon the defendant abandoned the land to which the agreement referred ; and the charge of the court was, in effect, that upon these facts the plaintiff was not entitled to recover.

There can be no doubt that, if by the terms of the original contract, it had been provided that the defendant should not pay a certain amount of the purchase money, until the vendor executed to him a valid title for the land in question, it would then fall directly within the principle of *Whitehurst v. Boyd*, 8 Ala. 375, and *Phillips v. Longstreth*, 14 Ala. 337. It is true, the general rule is, that verbal evidence is not admissible for the purpose of contradicting or altering a written instrument ; but this rule does not exclude such evidence, when it is adduced to prove that such instrument is totally discharged.—*Greenl. Ev.* § 302, and cases there cited. If the defendant had paid the whole of the purchase money, and taken possession under the contract, a court of equity would have enforced it, by decreeing a conveyance ; and if this could not have been done, on account of a want of title in the vendor, he would have been compelled to refund.—*Story's Eq.* § 762. This being the law, it would be singular if the parties could not, with the view of avoiding any future difficulty which might result from the failure of the vendor to obtain titles, extend the time of payment of the note, and provide that it should not be enforced if valid titles were not made within a certain time. We cannot doubt as to the validity of such an arrangement. So long as the vendee retained possession under the contract, it might operate on his part as a waiver, or extension of the time ; but he was not bound to wait always, since, by doing so, he was rendering himself liable to the actual owner, and might therefore abandon the possession in a reasonable time ; and if he did so, the note could not be enforced against him. The fact that the defendant retained possession of the other lands, does not affect the principle, as the subsequent agreement had no relation to them. It was the same as if no other land had been

purchased than the piece, the failure to make titles to which it was agreed should discharge the note.

It seems to have been supposed, from the charge that was subsequently requested, that the agreement as to the discharge of the note was in the nature of a penalty; and that, conceding its validity, the only benefit the defendant could obtain from it was, to scale the note to the amount of the actual value of the land to which titles were not made, and the fence which was upon it. But this position is not tenable. We doubt whether the doctrine can in any sense apply to an agreement of this character; but, if it does, the plaintiff can derive no advantage from it, as the damages resulting from the failure to make a good title were uncertain. There was but a single act to be done; and the disproportion between the value of the land to be conveyed and the amount due upon the note, if there was any, was so slight, that it could not authorize the court to declare it a penalty.—*Watts v. Sheppard*, 2 Ala. 425.

In relation to the defendant being estopped by his promise, made to the agent of the plaintiff on Sunday, to pay to him the balance due on the note when he should come out from Georgia, if he would not sue upon it, it is only necessary to say, that if the promise, and the action of the plaintiff upon it, would, under ordinary circumstances, conclude the defendant, it could not have that effect in the present instance; because the promise, being made on Sunday, could, under our decisions, have no binding effect.—*Saltmarsh v. Tuthill*, 13 Ala. 390; *Dodson v. Harris*, 10 Ala. 566; *O'Donnell v. Sweeney*, 5 Ala. 467.

What we have said disposes of the questions arising upon the charges given and requested, and we pass to the points presented by the rulings of the court below upon the evidence.

The evidence in relation to the tender of the deed made by a third person was also properly excluded, since, under the agreement proved, the defendant was not bound to accept a deed from any other person than the plaintiff. If the title was in the party who made the tender, it might, it is true, have accomplished the object of the contract, which could only have been the transfer of a valid title; but it might



have involved the trouble and expense of an inquiry to ascertain whether such title was good, and this inquiry the defendant was under no obligation to make. He had stipulated for a conveyance from the plaintiff; he had a right to stand upon the terms of his agreement in this respect, and was not bound to accept a tender made by a stranger.

As to the offer of the deed on the part of the plaintiff, it is to be observed, that by force of the agreement, as established by the evidence, the plaintiff was bound to execute to the defendant a valid title for the strip of land which was included in the purchase, within "a short time" from the 8th December, 1849; and if this was not done, the latter was to be discharged from the payment of the balance due upon the note; and this agreement, as we have seen, was a valid one. The record shows that the tender of the deed on the part of the plaintiff was not made until after the 13th of October, 1851, and after the defendant had abandoned the possession of the land. He was not bound to wait an unreasonable time for the plaintiff to convey, since, by doing so, he might, as we have said, subject himself to a recovery of *mesne* profits by the true owner; and we think that, under the circumstances, he was not required to wait for near two years. But however this may be, we cannot say there was error in the ruling of the court upon this point, for the reason, that although it appears that the tender was not made before the 13th October, 1851, it is impossible to say when it was made—*non constat*, but that it may have been made after the commencement of the action. The rule is, that the appellant must show error clearly; and if he fails to do so we will not presume it.

There was no error in refusing to allow proof by parol of the existence of the title to the lands by patent and deed, without first laying the proper basis for the introduction of secondary evidence. It is unnecessary to refer to cases to sustain a principle so familiar.

The only remaining question is, whether the non-residence of the grantor of a deed will, of itself, authorize the introduction of secondary evidence to prove title under it in the grantee. The presumption, in such a case, is that the deed is with the grantee, and if he is a party, as in the present case,



he must be notified to produce it, or its loss, or non-existence, must be established, before inferior evidence can be resorted to.

Judgment affirmed.

RICE, J., did not sit in this case, having been of counsel for the appellee before his election to the bench.

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## COLLIER'S ADM'R vs. WINDHAM.

[ACTION BY SHERIFF ON BOND OF INDEMNITY.]

1. *Fi. fa. issued after defendant's death void.*—A *fi. fa.* issued after the defendant's death, without a revival of the judgment, is void, except when issued to continue a lien acquired by a previous valid *fi. fa.*
2. *Bond of indemnity to procure levy of void execution, itself void.*—A bond of indemnity given to induce a sheriff to levy a void execution, is itself void, and cannot be enforced by suit.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. THOMAS A. WALKER.

ACTION under the Code by Joshua Collier against Irvine Windham, on a bond of indemnity. The complaint states, in substance, that at the March term, 1845, of the Circuit Court of Limestone county, William Brandon obtained a judgment against Achilles Whitlock, for a sum specified in the complaint; that on this judgment execution issued in the lifetime of Whitlock, and "a chasm intervened", and he died, and on the 8th March, 1847, a *fi. fa.* issued, which was delivered to the plaintiff, who then was the sheriff of said county, and who as such sheriff levied it on various articles of personal property specified in the complaint, as the property of Whitlock; that on the 13th March, 1847, said Brandon (who is not sued) and the defendant Windham executed to the plaintiff a bond, in the penal sum of one thousand dollars, the condition of which, after reciting all the aforesaid

facts except the death of Whitlock, concludes in the following words, to-wit: "And a doubt having arisen whether the right of said property is in said Achilles Whitlock, now, if the said William Brandon shall well and truly indemnify the said Joshua Collier, sheriff as aforesaid, against all suits, or actions, or other injury on account of said levy and sale, to take place by virtue of said execution at the request of said Wm. Brandon, then this obligation to be void; else, to remain in full force and virtue." The complaint then proceeds to assign a breach as follows: "And the plaintiff says, the condition of said bond has been broken by defendant, in this, that afterwards, to-wit, on the — day of —, 1847, plaintiff, at the request of said Brandon, sold said property mentioned above as such sheriff, for the sum of \$374 94, and paid the proceeds of said sale to said Wm. Brandon; that said Whitlock, against whose property said execution had been issued, died previous to its issuance, and his estate was regularly declared and settled as an insolvent estate; that after said sale, plaintiff was appointed, by the Probate Court of Limestone county, as administrator *de bonis non* of the said Whitlock; that one Allen McCargo had preceded him in said administration, and had resigned without collecting the assets of said estate; and plaintiff having declared and settled said estate as (an) insolvent estate, upon his final settlement thereof, on to-wit, 12th of January, 1852, plaintiff was charged with the value of all the property mentioned in said bond, it being the sum above-mentioned, with interest from said sale to said final settlement, it being \$119, and rendered a decree therefor to the creditors of said Whitlock against plaintiff. Yet said defendant, although he has had notice of the above facts, has not paid to the plaintiff the amount for which he has been charged in consequence of said sale, nor has he indemnified him, though requested so to do; nor did the said Wm. Brandon in his lifetime, nor his personal representatives since his death, nor this defendant, paid plaintiff said sums, or any part thereof," &c.

A demurrer, specifying the grounds of it, was filed to the complaint, and sustained by the court. The plaintiff refused to amend, and judgment was rendered against him; and he now assigns for error the sustaining of the demurrer.

WM. H. WALKER, for the appellant, contended that, although the execution was void, yet, as the parties to the bond did not know it, the act of the sheriff was not manifestly illegal; that as the parties in interest waived the trespass, and affirmed the sale, (which they had a right to do, as this court decided in 25 Ala. 543,) it did not lie in the defendant's mouth, at whose special request the plaintiff acted in making the levy, to set up the illegality of the act to avoid liability on his bond. He cited *Moore v. Appleton*, 26 Ala. 633, and authorities there referred to.

ROBINSON & JONES, *contra*, contended that the execution was a nullity (*Collingsworth v. Horn*, 5 Stew. & P. 237; *Holloway v. Johnson*, 7 Ala. 660; *Henderson v. Gandy's Adm'r*, 11 *ib.* 431; *Moore & Cocke v. Bell*, 13 *ib.* 469; *Stewart v. Nuckols*, 15 *ib.* 225; *Graham v. Chandler*, *ib.* 344), and that the bond of indemnity, being given to induce the sheriff to do an act not authorized by law, was also void, (*Renfro v. Heard*, 14 Ala. 25; *Prewitt v. Garrett*, 6 *ib.* 128.)

RICE, J.—The general rule is, that an execution issued after the death of the defendant therein named, without a revival of the judgment, is a nullity. An exception to this rule obtains, where an *alias* or *pluries* is issued after his death, to continue a lien which has been acquired by a former execution before his death, and which has not been lost by "a chasm" or otherwise.—*Fryer v. Dennis*, 3 Ala. 254; *Henderson v. Gandy*, 11 *ib.* 431; *Holloway v. Johnson*, 7 *ib.* 660; *Stewart v. Nuckols*, 15 *ib.* 225.

According to the statements of the complaint, the execution under which the plaintiff made the levy and sale, and took the bond here sued on, is not within the exception, but within the general rule. It was not issued to continue a lien, for when it issued there was no lien. It was no more than mere waste paper, and conferred no authority upon the plaintiff. The seizure of the property under it was a trespass, and the sale an unlawful act. The bond was given to induce the plaintiff, as sheriff, to sell the property under this *void* execution, and did induce him so to sell it; and being thus given to induce the sheriff to do an unlawful act, and under a *void* execution,

it is void, and cannot be enforced in a court of justice.—*Renfro v. Heard*, 14 Ala. 23.

Although doubts may exist whether the right of property is in a judgment debtor; yet, if the process levied on it by the sheriff is *void*, it is not lawful for him to take a bond to indemnify him for its sale under such process; and if in such case he takes such bond, he acquires no right thereby. “No right can be derived from an unlawful act”, in favor of a sheriff who does the unlawful act.—*Fambro v. Gantt*, 12 Ala. 298.

Judgment affirmed.

### COOK vs. ADAMS.

[MOTION TO DISMISS APPEAL, BECAUSE APPELLANT IS AN INFANT, AND ASSIGNS ERROR BY ATTORNEY.]

1. *Code (§ 2132) does not apply to appeals.*—Section 2132 of the Code, which provides that infants must sue by their next friend, and be defended by a guardian to be appointed by the court, has reference only to suits in the common-law courts of original jurisdiction, and does not apply to appeals, which must, therefore, be governed by the rules of the common law.
2. *Appeal by infant must be sued out by guardian or next friend.*—When the appellant is an infant, the appeal must be sued out by his guardian, or next friend, who may either give bond to supersede the judgment, or security for the costs of the appeal; and where (as in this case) the appeal is sued out by the infant in his own name, and errors are assigned by attorney, on the fact of such infancy being brought to the knowledge of the court by affidavits, the appeal will be dismissed on motion.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. TURNER REAVIS.

MOTION to dismiss the appeal, because the appellant, in whose name it was sued out, appears by the affidavits here filed in support of the motion to be an infant, who here assigns errors by attorney. The appellant was defendant below, and was sued by the appellee, in an action on the case, to recover consequential damages for a tort. Judgment was



rendered against the defendant below ; but he excepted to several rulings of the court, which are set out in the bill of exceptions, and which he here seeks to revise ; assigning for error, among other things, that the court proceeded to try the cause, and rendered judgment against him, being a minor, without the appointment of a guardian *ad litem*.

TURNER REAVIS, for the motion.

STEPHEN F. HALE, *contra*.

CHILTON, C. J.—Motion is made in this case to dismiss the appeal, on the ground that it appears to be sued out by an infant, and the errors are here assigned by attorney. The fact of appellant's infancy is conceded by the counsel, and is also clearly shown by an affidavit submitted with the motion.

It is to be regretted that our statute law does not more clearly point out the mode by which appeals shall be taken, in cases where judgments have been rendered against infants. The Code provides, that infants must sue by their next friend, and be defended by a guardian, to be appointed by the court. § 2132. This section has reference, however, to the mode of prosecuting suits in common-law courts of original jurisdiction, and not to appeals. We must, therefore, look to the common law for the rule.

It is well settled that an infant cannot appoint an attorney. He cannot, therefore, sue by attorney, but must sue by guardian, or *prochein amy*. "It is," says Chancellor Kent, "against the course and order of the court (to permit the infant to act by solicitor), and not conducive to the rights of the parties. The infants should act under the advice and discretion of their next friend, or guardian, and the opposite party has, in such case, a responsible person for costs."

Infants are not supposed to be able to act with discretion, and they might, if allowed *sua sponte* to institute suits, greatly prejudice their estates. Besides, they are incapable of entering into obligations, required to be executed in many forms of procedure in order to the successful prosecution of actions.

We deem it the only safe rule, to require in all cases, where an infant is plaintiff, that he should sue by his guardian, or next friend, who are responsible for costs, and who are not to

be indemnified by the infant's estate, unless they act in good faith and with ordinary discretion.—Burr. Rep. 506, 1026; Reeves' Dom. Rel. 265. In such case, no execution issues against the infant for the cost; for it is said costs came in lieu of the common-law amercement of the plaintiff *pro falso clamore*, and the infant could not be subject to an amercement, and of course could not be liable to its substitute.—Reeves' Dom. Rel., *supra*; 1 Lev. 308.

Where it is necessary for the protection of the infants' rights, the next friend, or guardian, may enter into bonds which may be necessary under the form of the proceeding adopted,—as in case of interposing a claim to try the right of property, it has been held by this court that the *prochein amy* may enter into a claim bond.—Strode v. Clark, 12 Ala. 621. We are aware of the English rule, which authorizes the infant to sue out the writ, but requiring him to declare by next friend or guardian. This rule, however, would not harmonize with our statutes.

An appeal is given in lieu of the old writ of error, and is regarded as the prosecution of a new suit.—23 Ala. 668. It must, where the appellant is an infant, be sued out by his guardian, or next friend, who may supersede the judgment, if need be, by entering into bond, or may give security for cost in this court as required in such cases.

The motion must be granted. Let the appeal be dismissed.

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## ERWIN ET AL. vs. HAMNER.

### [BILL IN EQUITY TO ESTABLISH NUNCUPATIVE WILL.]

1. *Presumption that every man knows the law.*—The rule that every man is presumed to know the law, is now too firmly settled by a long course of judicial decisions to be disturbed; and although it may frequently be productive of hardship or injustice, yet this consideration can only properly be addressed to the executive, or to the law-making power.
2. *Equity will not establish void nuncupative will on ground of ignorance or mistake of law.*—A nuncupative will bequeathing personal property of more than five

hundred dollars in value, which is void under the Code (§ 1615), cannot be established in equity on the ground of the decedent's ignorance or mistake as to the change in the law in this respect made by the Code.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed by the appellants, as heirs-at-law and distributees of Charles R. Marshall, deceased, to establish the nuncupative will of the said decedent, which was made and published on the 4th April, 1853, during his last sickness, and was committed to writing within five days after his death. By this testament, after giving a specific legacy of several slaves to an adopted daughter, said decedent directed the balance of his property, which exceeded \$500 in value, "to be equally divided among his people." To avoid the effect of the provisions of the Code (§ 1615), the complainants allege, "that said Marshall, at the time of his death, was under the full belief and conviction that the law in relation to nuncupative wills at that time was what it had been years before, and that he had no idea or knowledge of the change made in that respect by the Code of Alabama, which went into operation on the 17th January, 1853; that there was not one man, in the vicinity in which said Marshall lived and died, who knew of the change in relation to nuncupative wills, although the citizens in that part of the county possess at least the ordinary degree of information and intelligence, and there are some professional men among them; that said Marshall lived in a somewhat remote and secluded part of the county of Wilcox, not readily accessible at any time to the ordinary means and sources of general information; and that for weeks after the 17th day of January, 1853, and extending nearly up to the time of said Marshall's death, the neighborhood in which he lived was rendered almost entirely inaccessible by excessive rain and high water; so that, in addition to the reason hereinbefore stated, complainants are convinced, and so expressly charge, that said Marshall, although he was a man of ordinary information and intelligence, and of temperate and industrious habits, was utterly ignorant, at the time of uttering and publishing said testamentary words, of the law in relation to nuncupative wills, and could not, under

the circumstances, be presumed to know what the law was, if it had been changed on and after the 17th January, 1853, as it was by the Code."

The chancellor sustained a demurrer to the bill for want of equity, and his decree is now assigned for error.

J. H. CAMPBELL, for the appellant, contended, that there is a clear and rational distinction between mistake and ignorance of the law; that although relief will not be granted on account of ignorance of the law, yet an acknowledged mistake of law is not beyond the reach of equity; that all applications to equity for the reformation of written instruments, upon examination, will be found to proceed on the ground that the legal rights of the parties have been mistaken. He cited the following authorities: *Landsdowne v. Landsdowne*, *Moseley's R.* 364; *Bingham v. Bingham*, 1 *Vesey, Sr.*, 126; *Leonard v. Leonard*, 2 *Ball & Beatty*, 180; *Gee v. Spencer*, 1 *Vern.* 31; *Simpson v. Vaughan*, 2 *Atk.* 30; *Onions v. Tyrer*, 2 *Vern.* 741, or 1 *Pr. Wms.* 343-5; *Perritt v. Perritt*, 14 *East's R.* 424; *Pusey v. Desbouvrie*, 3 *Pr. Wms.* 315; *Cann v. Cann*, 1 *ib.* 726; *Broderick v. Broderick*, *ib.* 239; *Jones v. Morgan*, 1 *Bro. C. C.* 218; 2 *Wm. Bla.* 825; *Bize v. Dickason*, 1 *D. & E.* 286; *Naylor v. Winch*, 1 *Cond. Eng. Ch. R.* 288; *Willan v. Willan*, 16 *Ves.* 72; *Leonard v. Leonard*, 4 *Ball & Beatty*, 83; *Evans v. Llewellyn*, 1 *Cox*, 333; *Samuel v. Evans*, 2 *Term R.* 569; *Lawrence v. Beaubien*, 2 *Bailey's Law R.* 623; *Hunt v. Rousmanier's Executors*, 8 *Wheat.* 174; *Lowndes v. Chisolm*, 2 *McCord's Ch. R.* 455; *Rogers v. Atkinson*, 1 *Kelly's (Geo.) R.* 12; *McCarthy v. Decaix*, 2 *R. & M.* 614; *Champlin v. Layton*, 6 *Paige's R.* 189; 11 *Ohio R.* 223-32; *ib.* 486; *Executors of Hopkins v. Mazyck*, 1 *Hill's Ch. (S. C.) R.* 250; *Hale v. Stone*, 17 *Ala.* 557; *Larkins v. Biddle*, 21 *ib.* 252; *Trapp & Hill v. Moore & Border*, *ib.* 696.

WILLIAMSON, and WATTS, JUDGE & JACKSON, *contra*, argued, that when no time is fixed by a statute for the commencement of its operation, it takes effect from its passage; and that ignorance of its existence is no excuse for a violation of it, nor a ground for relief against it:—citing 1 *Kent's Commentaries*, p. 458; *Weatherford v. Weatherford*, 8 *Port.* 171; *State v. Click*, 2 *Ala.* 26; *Thompson v. Stickney*, 6 *ib.* 579; *Branch Bank at Mobile v. Murphy*, 8 *ib.* 119; 7 *Wheat.* 164.



GOLDTHWAITE, J.—The bill alleges, that the testator, in April, 1853, made an unwritten will, disposing of personal property of a greater amount in value than five hundred dollars ; and its object is to establish this will, on the ground that, at the time it was made, the testator was ignorant of the change made by the Code in the law of nuncupative wills, and that the ignorance of such change was occasioned by circumstances beyond his control which rendered the promulgation of the new law ineffectual as to him.

By reference to the Code (§§ 1611, 1615), it will be seen that real estate cannot pass by will, unless it be in writing ; and that as to personal property, an unwritten will is invalid, if the amount of property bequeathed by it exceeds in value the amount of five hundred dollars. The legal question, then, which the bill presents, is simply, whether equity can give validity to an act which the statute has declared invalid. The rule is, that every man must be presumed to know the law ; and this doctrine is carried so far, that even penal statutes are held, when no other time is prescribed by law, to be operative and effectual from the time of their passage (*State v. Click*, 2 Ala. 26) ; and it would make no difference that the statute denounced an act which was in itself innocent, and which from the nature of things could not possibly be known to be contrary to law, by the party at the time of its commission.—*The Ann*, 1 Gall. 62. It may be conceded, that the rule, thus enforced, may frequently be productive of hardship and injustice ; but it is only to the executive, or to the law-making power, that these considerations can properly be addressed, as the rule is too firmly fixed by a long course of judicial decision to be departed from by judges.—1 *Kent's Com.* 454-459.

To the present case, however, these considerations have no application, as the bill shows, when taken in connection with the acts passed in relation to the promulgation of the Code (*Acts* 1851-2, p. 23), that the will which is attempted to be set up, was not made until nearly three months after the Code took effect, and nearly five months after the proclamation of the governor made with a view to its promulgation. The utmost that could be demanded of the State, is, that a reasonable time should be given to the citizen to inform himself

with regard to the changes in the law ; and if this is done, the individual who fails to use the necessary means to obtain information, should lay the blame at his own door.

We do not, however, understand the counsel for the appellants to deny the rule we have asserted ; but he insists that there is a distinction between *ignorance* of the law and a *mistake* of the law, and bases his claim to relief upon the latter ground. We will not investigate the soundness of this distinction ; neither will we undertake to say that there may not be cases in which a party will not be relieved against agreements made, or acts done by him, under a clear mistake of the law, such acts or agreements being in other respects unobjectionable ; although we incline to think, that most of the cases which seem to hold this, when carefully analyzed, will be found to be based upon other principles. But we do not intend to discuss this question : we may concede, so far as this case is concerned, that circumstances, not in themselves sufficient to entitle a party to relief in equity, may be so strengthened by a mistake in reference to what the law was, as to entitle the party to call upon that court to interfere in his behalf ; and this concession would not help the appellants. We must go still further, and hold that equity can annul the statute, at least in the particular case ; and, although courts of chancery have sometimes gone a great way in this direction, they have never yet, as we have learned, gone so far as to hold an act valid which the statute declares invalid, merely because it was done through ignorance or mistake of the law. If this was admitted, a verbal unexecuted promise within the statute of frauds could be established in the very teeth of the statute ; a will of real estate, although not in writing, and without the number of witnesses which the law requires, could be sustained, if proved to have been made under the supposition that the law imposed no such requisitions. The principle which we must establish to give the appellants relief in the present case, would not only lead to great practical inconvenience, but is directly in conflict with the authorities, and would tend to subvert long-established and well settled legal principles.

Decree affirmed, at the cost of the appellants.

## REESE vs. HARRIS.

[DETINUE FOR A SLAVE.]

1. *What title will support detinue.*—To maintain detinue, the plaintiff must have, at the time his action is commenced, a general or special property in the chattel sued for, and the right to its immediate possession; and if he has never had the actual possession, he cannot recover without showing a legal title.
2. *Common law presumed to exist in sister State.*—The courts of this State will presume that the common law is in force in a sister State, except so far as it is shown to have been changed or repealed by statute.
3. *Distributee, in Virginia, as at common law, cannot bring detinue.*—At common law, the title to the personal property of an intestate is cast upon his personal representative, and not upon his next of kin; and the statutes of Virginia, as shown in the record in this case, have not changed the common law in this respect; and consequently a sole distributee in Virginia, who has never had possession, before administration granted or distribution made, has not such a title to the personalty as will sustain detinue.
4. *Error without injury.*—If the evidence, as stated in the bill of exceptions, shows that the plaintiff has not such a title as will sustain his action, the appellate court will not, at his instance, examine into the correctness of the charges given or refused by the primary court; since, even if erroneous, no legal injury could have resulted to him.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

DETINUE by Lucy Reese against Mary M. Harris, for a slave named Charles; pleas, *non detinet*, and the statute of limitations of six years.

All the evidence is set out in the bill of exceptions, but the view here taken of the case renders it unnecessary to give a detailed statement of it. The material facts are these:

Thomas Williams, who was the plaintiff's father, died in Brunswick county, Virginia, in January, 1787; having first made and published his last will and testament, dated December 26, 1786; and leaving a widow and two daughters, Sally and Lucy, the latter of whom is the present plaintiff. By this will, which was admitted to probate in said county of Brunswick on the 22d January, 1787, the testator bequeathed to his daughter Sally a negro woman, named Jane, or Jenny.



who was the maternal grandmother of the slave now sued for ; and also made provision for his son Samuel, who, however, died a few days before the testator, and left no issue.

After the testator's death, the widow dissented from the will, according to the laws of Virginia, and claimed her dower in her husband's estate ; and for that purpose a bill in equity was filed. From the transcript of this suit, which is incorporated in the record, it appears that the bill was filed by said widow and her second husband (Lewis Holloway), and the present plaintiff and her then husband (John West), against the executor of said testator ; that the prayer of the bill was for a final settlement and division of the estate ; that commissioners were appointed by the court to make the division ; and that their report, by which the slave Jenny was allotted to Mrs. Holloway, was made on the 26th December, 1796, and was confirmed by the court. In these proceedings no notice is taken of Sally Williams, to whom (as above stated) the slave Jenny was bequeathed by the testator, and who had died, without issue, before the allotment of dower was made ; but the precise time of her death is not stated.

After Mrs. Holloway thus obtained possession of said slave, she removed with her and her increase, among whom was Viney, the mother of the slave now sued for, to Edgefield district, South Carolina ; and there, in 1820, she divided off said slaves among her children by her said second husband. On this division, Thomas Holloway, one of her sons, obtained the girl Viney, and brought here to this State in 1820 or 1821, where she afterwards gave birth to the boy Charles. The slaves remained in the possession of said Holloway up to 1846, when the boy Charles was sold as his property, and was purchased by the defendant's husband, who held and claimed him as his absolute property until his death ; and since that time defendant, as her husband's administratrix, has held and claimed said slave. Mrs. Holloway, the widow of said testator, died in Edgefield district, South Carolina, on or about the 10th December, 1847.

The defendant introduced evidence to sustain her plea of the statute of limitations, which was met by rebutting evidence on the part of the plaintiff ; but this evidence, under the opinion of the court, is immaterial.



The plaintiff introduced as evidence certified copies of certain statutes of the State of Virginia, which may be thus described :—

1. "An act concerning wills, the distribution of intestates' estates, and the duty of executors and administrators"; which went into operation on the first day of January, 1787, and the material sections of which are in these words :

"§ 21. When any widow shall not be satisfied with the provision made for her by the will of her husband, she may, within one year from the time of his death, before the general court, or court having jurisdiction of the probat of his will as aforesaid, or by deed executed in the presence of two or more credible witnesses, declare that she will not take or accept the provisions made for her by such will, or any part thereof, and renounce all benefit which she might claim by the same will ; and thereupon, such widow shall be entitled to one-third part of the slaves whereof her husband died possessed, which she shall hold during her life, and at her death they and their increase shall go to such person, or persons, to whom they would have passed and gone if such declaration had not been made ; and she shall moreover be entitled to such share of his other personal estate as if he had died intestate, to hold to her as her absolute property. But every widow not making a declaration within the time aforesaid, shall have no more of her husband's slaves and personal estate than is given her by his will."

"§ 22. And that if any widow, possessed of a slave or slaves as of the dower of her husband, shall remove, or voluntarily permit to be removed out of this commonwealth, such slave or slaves, or any of their increase, without the consent of him or her in reversion, such widow shall forfeit all and every such slave or slaves, and all other the dower which she holds of the endowment of her husband's estate, unto the person or persons that shall have the reversion thereof ; any law, custom, or usage to the contrary notwithstanding."

"§ 25. When any person shall die intestate as to his goods and chattels, or any part thereof, after funeral debts and just expenses paid, if there be no child, one moiety, or, if there be a child or children, one-third of the surplus, shall go to the wife ;

but she shall have no more than the use for her life of such slaves as shall be in her share; and the residue of the surplus, and after the wife's death the slaves in her share, or, if there be no wife, then the whole of such surplus, shall be distributed in the same proportions, and to the same persons, as lands are directed to descend in and by an act of the general assembly, entitled 'An act directing the course of descents.' Nothing in this act contained shall be understood so as to compel the husband to make distribution of the personal estate of his wife, dying intestate. When any children of the intestate, or their issue, shall have received from the intestate in his lifetime any personal estate, by way of advancement, and shall choose to come into the distribution with the other persons entitled, such advancement shall be brought into hotchpot with the distributable surplus.

"§ 38. Executors and administrators, whether it be necessary for the payment of debts or not, shall, as soon as convenient after they are qualified, sell, at public sale, all such goods of their testator or intestate, specific legacies excepted, as are liable to perish, be consumed, or rendered worse by keeping; giving such credit as they shall judge best, and the circumstances of the estate will admit of, and taking bonds and good security of the purchasers; and shall account for such goods according to the sales. If more be sold than will pay the debts and expenses, the executor or administrator may assign the bonds for the surplus to those entitled to the estate, and be discharged as to so much."

"§ 39. If such perishing goods be not sufficient for paying the debts and expenses, the executor or administrator shall proceed, in the next place, to sell the other personal estate, disposing of the slaves last, until the debts and expenses be all paid; having regard to the privilege of specific legacies."

2. "An act directing the course of descents"; which also took effect on the first day of January, 1787, and of which the material sections are as follows:

"§ 1. Be it enacted," &c., "that henceforth, when any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred, male and female, in the following course—that is to say:

"§ 2. To his children, or their descendants, if any there be.

"§ 3. If there be no children, nor their descendants, then to his father.

"§ 4. If there be no father, then to his mother, brothers, and sisters, and their descendants, or such of them as there be."

The court charged the jury, among other things, that under the will of Thomas Williams, his daughter Sally took a vested right in the woman Jenny, which, at her death, belonged to her estate; and if plaintiff had failed to show that there had been an administration on her estate, the legal title to the boy sued for was still in her estate, and therefore plaintiff could not recover. This charge, to which the plaintiff excepted, together with several other rulings of the court, is now assigned for error.

GEO. W. GAYLE and JNO. C. SNEAD, for the appellant, contended, that no administration was necessary on the estate of Sally Williams, because, 1st, plaintiff was her only heir, and after so great lapse of time, on the authority of Gantt's Adm'r v. Phillips, 23 Ala. 275, an administration and its settlement would be presumed; 2dly, because the slave came from the widow's dower estate, which was obtained after the death of Sally Williams, and on the death of the tenant for life, under the 21st section of the Virginia statute "concerning wills", &c., went to the living heir of the testator; and, 3dly, that under the 25th section of the same statute, personal property, like real estate, descends directly to the heirs.

WM. M. MURPHY, *contra*, insisted that the plaintiff did not show such a title as would sustain the action of detinue, and that the statutes of Virginia, as shown in the record, did not dispense with the necessity of administration on the estate of an intestate; citing the following cases: Walden v. Payne, 2 Wash. R. 1; Sale v. Ray, 2 Hen. & Mun. 69-78; Lomax on Executors, vol. 2, p. 225; Miller v. Eatman, 11 Ala. 609; Hogan v. Bell, 1 Stew. 536; Price v. Talley's Adm'rs, 18 Ala. 25.

RICE, J.—To maintain detinue, the plaintiff must have, at the time the action is commenced, a general or special



property in the specific thing sued for, and the right to the immediate possession thereof. Unless both these rights concur, at the commencement of the suit, the action will not lie. 1 Chitty's Pl. 122.

Where the plaintiff has not had actual possession of the thing sued for, he must resort to proof of his title, in order to show his right of possession.—3 Starkie's Ev. 1483. And in such case, it is not sufficient to prove an *equitable* title. If he has never had possession, he cannot recover without showing a *legal* title.—Parsons v. Boyd, 20 Ala. R. 112.

At common law, neither the creditors nor next of kin were entitled to the personal property of an intestate. We must presume that law to be in force in Virginia, except so far as it has been repealed or amended by the statutes of that State. Those statutes, shown in the present record, do not cast the title of an intestate to *personal property* upon his next of kin, but upon his personal representative. The right given by those statutes to the next of kin, as to the personal property of the intestate, is a right to distribution; and that right is given *sub modo*. The personal representative is authorized and required to pay the debts of the estate, expenses, &c. &c.; and, if necessary for such purposes, to sell all the personal property. Before any administration granted or distribution made, the right of a sole distributee, who has never had possession, to the personal property of the intestate, under those statutes, is not such a right as can entitle such distributee to recover any such property in detinue.—Jones v. Tanner, 7 Barn. & Cress. 542; 2 Wms. on Ex'rs, 1187; Vanderveer v. Alston, 16 Ala. R. 494.

The only right which the plaintiff has, or pretends to have, to the slave in controversy, is the right conferred by those statutes upon her as the sole heir-at-law and distributee of her sister, Sally Williams, or as the sole heir-at-law and distributee of her mother and of her said sister. In other words, the right asserted by the plaintiff, and relied on for a recovery in this action, is no more than the right of a sole distributee who has never had possession, to the personal property of the intestate. That right, as we have seen, can never entitle her to recover in this action. And as it is clear she has no other right, it is useless to inquire whether the court below did not err on



some other point ; for, if there was error, there could not be injury in legal contemplation.—*Caruthers v. Mardis*, 3 Ala. 599 ; *Marshal v. Betner*, 17 *ib.* 836 ; *Gilmer v. Ware*, 19 *ib.* 252.

Judgment affirmed.

## PACE AND WIFE *vs.* BONNER.

[DETINUE FOR A SLAVE—CONSTRUCTION OF WILL.]

1. *As to rule of construction which gives effect to the latter of two repugnant clauses in a will.*—The rule of construction which sacrifices the former of two repugnant clauses in a will, is only applied on the failure of every attempt to give to the whole will such a construction as will render every part effective ; and to this end clauses and sentences may be transposed, if by such transposition a consistent disposition may be deduced from the entire will.
2. *Bequest to one of negro woman “and all her increase which she now has or may hereafter have”, and by subsequent clause to another of one of her children by name.*—A testator bequeathed to his daughter a negro woman, named Jinney, “and all her increase which she now has or may hereafter have”, and by a subsequent clause gave to his son a negro boy named Moses, who was a child of Jinney’s : *Held*, that the latter bequest must be construed as an exception to the former, and that the boy Moses passed to the testator’s son.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. C. W. RAPIER.

DETINUE by James M. Bonner against the appellants, for a negro boy named Moses, whom the plaintiff claimed under the will of his father, which was in these words :

“I ordain this my last will and testament, as follows, to-wit—1. I will that my just debts be paid. 2. I give and bequeath unto my daughter Emily one negro woman, Jinney, and all her increase which she now has or may hereafter have. I give and bequeath to my daughter Jane one negro woman, named Hagar, and her children Jane and Jim, together with their future increase. I give and bequeath unto my son Madison one negro man named Luke, one negro woman named Sophy, and one negro boy named Moses. 4. I give and be-

queath unto my wife one negro woman named Leah, and at her death I will that said negro woman shall be given to my son Madison. I will that all the rest of my property, at the death of my wife, be divided among my children. I appoint my brother, Jordan Bonner, and my wife, my executors."

It was proved, on the trial, that Mrs. Pace, one of the defendants, was the testator's daughter Emily named in the will,—that the boy Moses was the son of the woman Jinney, and that there was no other boy of that name belonging to the testator's estate; "whereupon the court charged the jury, that, notwithstanding Moses is admitted to be the child of Jinney, yet, if this was the only slave of that name belonging to the testator, the bequest was to Madison, and he was entitled to hold Moses in preference to Emily." To this charge the defendants excepted, and they now assign it for error.

WATTS, JUDGE & JACKSON, for the appellants :

1. There can be no doubt that the boy Moses is twice bequeathed in the will—first to Emily, and afterwards to Madison; and the gift to the latter is not more special than that to the former, although expressed in less general language. The gift to Emily, of all the increase of Jinney "*which she now has*", would not have been more certain if each of the children had been mentioned by name. If the subsequent gift to Madison had never been made, would not Moses have passed under the former clause to Emily? *Id certum est quod certum reddi potest.*

2. Moses, then, being twice bequeathed by different clauses, what is the proper construction of the will? The rule of construction which gives effect to the latter of two repugnant clauses, is very curiously deduced by that "subtle commentator," Lord Coke, from the following text of Littleton:—"And if a man, at divers times, makes divers testaments, and divers devises, &c., yet the last devise and will made by him shall stand, and the others are void." In commenting upon this passage, Lord Coke deduces from the "&c." that "in one will, where there be divers devises of one thing, the last devise taketh place"; and this seems to have been the origin of the rule since so often unmeaningly quoted. But this is not the true rule. Mr. Hargrave, in his note on Coke's said

commentary, says,—“The opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties.”—2 Thomas’ Coke, top p. 760, n. 12. The weight of authority, both English and American, is in favor of this proposition.—1 Jarman on Wills, mar. pp. 417–18; Keyes on Chattels, §§ 120 to 125; Field v. Eaton, 1 Dev. Eq. 284; McGuire v. Evans, 5 Ired. Eq. 269.

3. If the two legatees take by moieties, one cannot maintain detinue against the other.—Miller v. Eatman, 11 Ala. 609.

R. C. TORREY, *contra*, contended that the specific bequest of Madison must prevail over the previous bequest to Emily, and cited the following authorities: Hollins v. Coonan, 9 Gill’s R. 62; Bradstreet v. Clark, 12 Wend. 602; Ulrich v. Litchfield, 2 Atk. 372; Cuthbert v. Lempriere, 3 M. & Sel. 158; Pratt v. Rice, 7 Cush. 209; Hunter v. Green, 22 Ala. 336; Walker v. Walker, 17 *ib.* 376; 2 Stew. 170; Baird v. Baird, 7 Ired. Eq. 265; Hunt v. Johnson, 10 B. Mon. 342.

CHILTON, C. J.—The slave, Moses, is the only one of that name owned by the testator, and he is the child of Jinney, who is given by the second clause of the will to the testator’s daughter, Emily. Moses, then, is given to Emily by the second item as one of the children—“the increase she (Jinney) now has”—and by name to Madison, the plaintiff; and as it is alleged that the two bequests are repugnant, the plaintiff insists that the last to Madison must stand, and that consequently the first is void. The primary court so ruled the law to be.

There seems to be much conflict of authority on this subject, both in England and in this country. Lord Coke says,—“Also, in one will, where there are divers devises of one thing, the last devise taketh place. *Cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est.*”—2 Thomas’ Coke, (ed. 1836) top p. 525. The annotators upon Coke, in a note to this passage, say: “The opinion supported by the greatest number of authorities is, that the two devisees shall take in moieties.”

It is, however, unnecessary for us at this time to collate the cases *pro* and *con* upon the question, since they are gene-

rally agreed, that the rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render every part effective. To this end, clauses and sentences may be transposed, if by such transposition the court may give effect to the intention, and deduce a consistent disposition from the entire will.—1 Jar. on Wills, (2 Amer. ed.) p. 396–7, top. As an illustration of this rule, the author just quoted observes,—“ So, where testator, after devising the whole of his estate to A., devises black acre to B., the latter devise will be read as an exception out of the first, as if he had said, ‘ I give black acre to B., and subject thereto, all my estate, or the residue of my estate, to A.’ ”—Cuthbert v. Lempriere, 3 Maul. & Sel. 158. The case before us is strikingly analogous to the case cited by way of illustration. Here, the testator gives a negro woman slave, and all her present and future increase, to Emily, and then gives Moses, one of such increase, to his son Madison. The last specific bequest of one of the slaves must be regarded as an exception out of the general bequest of all the woman’s increase, and the will must be read as though the testator had said, ‘ I give Moses to Madison, and subject to this bequest, I give his mother, with all her present and future increase, to my daughter Emily’. This construction gives effect, we think, to the true intention of the testator. The other children of Jinney then born pass under the will to Emily ; and Moses, who is given by name to Madison, is excepted out of the increase, and passes to him.

Such being the view we entertain of the will, it follows that we sustain the ruling of the Circuit Court.

Judgment affirmed.



## LANG vs. PHILLIPS.

[MOTION AGAINST SHERIFF FOR FAILING TO PAY OVER MONEY COLLECTED UNDER EXECUTION—QUESTION OF PRIORITY BETWEEN EXECUTION CREDITORS.]

1. *Rule for computation of time under statute.*—In the computation of time from an act done, the day of performance is excluded, and fractions of a day are not recognized; but in construing a statute, which, as between different acts, gives a preference or priority to that which is first done, this rule, *it seems*, does not apply.
2. *Application of rule.*—Under the statute regulating the practice in the common-law courts of Mobile, which provides (Pamphlet Acts 1853-4, p. 92, § 10) that “the lien acquired by any execution issuing from either of said courts shall not be lost, if *alias* executions issue to the sheriff *without interval of more than ninety days*”, an original execution was returned on the 14th April, and an *alias* was issued on the 14th July next thereafter: *Held*, that the lien was not lost.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS was a motion against the appellant, as sheriff of Mobile county, for failing to pay over money collected under execution. By consent of parties, a jury was dispensed with, and it was agreed that the court should decide both the law and the facts of the case. The facts, as disclosed by the bill of exceptions and judgment entry, were as follows:

The plaintiff, having a judgment against one Adam C. Hollinger in the Circuit Court of Mobile, procured an execution to be issued thereon on the 14th day of December, 1853, which was returned by the defendant, as sheriff, on the 14th day of April, 1854, “no property found.” On the 14th day of July, 1854, another execution was issued on this judgment, returnable on the first Monday in November, 1854; “and on the said day plaintiff gave the sheriff a bond of indemnity to levy on and sell a slave named Jim, the property of said A. C. Hollinger.” The sheriff made the levy, and sold said slave on the 7th day of August, 1854, and received the money. A portion of the proceeds of the sale of said slave was appropriated by the sheriff to the payment of an older execution, which was in his hands at the same time; and the surplus, which

was claimed by the plaintiff in this motion, was paid on an execution in favor of one William Hill against said Hollinger, which was issued on the 19th day of June, 1854, and was in the sheriff's hands when he made said levy; the last preceding execution on said Hill's judgment having been issued on the 21st day of February, 1854, and returned on the 14th day of April "no property found." The question was thus presented, whether the lien acquired by plaintiff's execution of the 14th December, 1853, was lost; and this involved the construction of the tenth section of the act of February 17, 1854, "to regulate the sessions of the Circuit and City Courts of Mobile county," which provides, "that the lien acquired by any execution, issuing from either of said courts, shall not be lost, if *alias* executions issue to the sheriff without interval of more than ninety days." The court below, on the facts above stated, held that the lien of the plaintiff's execution was not lost, and rendered judgment accordingly; to which the defendant excepted, and which he now assigns for error.

JOHN T. TAYLOR, for the appellant, made these points:—

1. There was an interval of more than ninety days between the issue of plaintiff's *alias* execution and the return of the original execution. At common law, when given periods or days are set, the rule for the computation of time is, to exclude the first and include the last day, or (which amounts to the same thing) to include the first and exclude the last; and by this method, though no time is actually lost, fractions of a day are avoided. For instance, counting from 12 o'clock on the first day of April, to 12 o'clock on the first day of May, there are, in law, exactly thirty days; yet, in fact, there are only twenty-nine entire days, and two half-days. Applying this rule to the case, we would have in April, excluding the 14th, sixteen days; in May, thirty-one days; in June, thirty days; and in July, including the 14th, fourteen days; which make, in all, ninety-one complete legal days. The error in the rule of computation contended for by the appellee, which was adopted by the court below, may be shown by the following illustration: Suppose the first execution was returned at 12 o'clock on the 14th April, and the *alias* issued at 12 o'clock on the 14th July; the ninetieth day would, in fact, expire at

12 o'clock on the 13th July, and yet, under that rule of computation, the latter half of the 14th April, the latter half of the 13th July, and the first half of the 14th, must be excluded, thus getting rid of one and a half entire days. Computing time by this rule from the first day of January, 1854, to the first day of January, 1855, in periods of ninety days, every ninetieth day would be lost, and the year be found to contain only 361 entire days. The true rule is, to exclude only the first or the last day.—*Vairin v. Edmonson*, 5 Gilm. 270 ; In the matter of *Wilman*, 5 Washb. (Maine) R. 653.

2. The record does not show that the *alias* execution, though issued on 14th July, came to the hands of the sheriff on that day.

E. S. DARGAN, *contra*, contended, that the true rule of computation is, to exclude the first day, and if the act is required to be done within a certain number of days, the party has all of the last day within which to do it ; but if the act is to be done after a certain number of days, the whole number of days must pass before it can be done.—*Judd v. Fulton*, 10 Barb. S. C. R. 117 ; *Wiggin v. Peters*, 1 Metc. 127.

GOLDTHWAITE, J.—The act of the 17th February, 1854, (Acts 1853–4, p. 92, § 10) regulating the practice of the City and Circuit Courts of Mobile county, provides, that the lien acquired by any execution from either of said courts shall not be lost, if an execution issue to the sheriff “without interval of more than ninety days.” In the present case, the original execution was returned on the 14th April, 1854, and an *alias* was issued on the 14th July, 1854. Assuming, for the present, that it came to the hands of the sheriff on the same day on which it issued, the question is, whether the lien was lost ; or, in other words, whether according to the rules of law, there is an interval of *more* than ninety days between the 14th of April and the 14th of July.

The rule is now well settled, that in the computation of time from an act done, the day of performance is to be excluded.—*Bigelow v. Wilson*, 1 Pick. 485 ; *Judd v. Fulton*, 10 Barb. 117. If, therefore, the law had required the issue of the *alias* execution within ninety days, in order to preserve the lien, it

is clear that, if issued at any time on the ninetieth day, it would be sufficient. Including the first day and excluding the last, from the end of the fourteenth day of April to the end of the fourteenth day of July, are ninety-one full days. But the rule we have referred to results from the fact, that the law, in such cases, refuses to recognize the parts or fractions of a day—that period is regarded as an indivisible point of time (*Bigelow v. Wilson, supra*); and under the influence of this rule, we must regard the *alias* execution as having issued precisely at the instant at which the 14th day of July commenced; and between this point and the termination of the 13th day, there is no interval. Under this view of the law, there cannot be *more* than ninety days from the first day, until the last instant of the ninety-first day has passed. If indeed the statute had provided that the lien should be lost if an execution did not issue without an interval of ninety days, then, the issue on the ninety-first day would not preserve the lien; but we must give effect to the meaning of the word “*more*” which is used in the statute, and although the reasoning may savor of refinement, we cannot do this, without infringing on well settled rules, unless we include the whole of the ninety-first day. Any other construction would render that word entirely unmeaning. Our conclusion, therefore, is, that the statute must be construed as if it had said that the lien should not be lost if an execution issued to the sheriff without interval of *more days than ninety days*.

We may remark, however, that the same rule does not apply to statutes which, as between different acts, give a preference or priority to the one which is first done; and in such cases, courts will regard the fractions of a day.

It is urged that the record does not show that the execution of the appellee, although issued on the 14th July, came to the hands of the sheriff on that day. But we think this sufficiently appears from the statement in the bill of exceptions, that on the day on which the sheriff received the *alias* execution, he required a bond of indemnity; which is set out in the record,—bears date on the same day with the *fi. fa.*, and recites that it was in his hands when the bond was executed.

Judgment affirmed.



## SMITH, ADM'R, &amp;C., vs. DUNN, EXECUTOR, &amp;C.

[BILL IN EQUITY BY TENANT IN COMMON FOR PARTITION OF A SLAVE.]

1. *Denial by defendant of complainant's title no ground for dismissing bill or directing issue at law.*—Conceding that, on a bill for partition of land between tenants in common, if the defendant denies the plaintiff's title, and sets up an adverse possession and title in himself in severalty, the court will not proceed until the plaintiff has established his right at law; yet this rule cannot be extended to a bill for partition of a slave between tenants in common. The reason of the rule is, that such denial and claim set up in the answer is held an actual ouster, for which a tenant in common of land may bring ejectment against his co-tenant; but a tenant in common of a slave cannot maintain any action at law against his co-tenant to try or establish his title, while the latter has possession.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. A. J. WALKER.

THIS bill was filed by the appellee, as executor of John Potter, deceased, against the appellant, as administrator of William Potter, deceased; and its object was to obtain partition of a slave, which was alleged to have been bequeathed to one David Potter for life, "and at his death to go to his sons, John and William, to be equally divided between them." The bill alleged, that the slave was held by said David Potter during his life under said bequest; that on his death said slave went into the possession of said William Potter, remained in his possession until his death, and has since that time been in the possession of the defendant as his administrator; that John Potter, complainant's testator, died in 1848, after having made and published his last will and testament, which has since been admitted to probate, and by which he bequeathed his interest in said slave to his brother William; that the estate of John Potter is insolvent, and that it will require all his property to pay the debts of his estate.

The defendant answered the bill; admitting his possession of the slave as administrator of said William Potter, denying all the allegations of the bill as to said John Potter's interest in him, and averring that his intestate died seized and possessed of said slave. On final hearing, on bill, answer, and

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Smith, adm'r, &c., v. Dunn, Exec'r, &c.

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proofs, the chancellor rendered a decree in favor of the complainant, ordering a sale of the slave for the purpose of partition and an account of the hire ; and this decree is now assigned for error.

WILLIS & WILLIAMS, for the appellant, contended, that since the complainant's title is denied in the answer, the court cannot go on and decree partition, but will at once dismiss the bill, or, perhaps, direct an issue at law to be tried ; that the rule is settled when the application is for partition of land, and there is no good reason why a distinction should be made between real and personal estate ; and that the complainant's bill makes out a case of conversion, for which he had a remedy at law. They cited, on the first point, *Wilkin v. Wilkin*, 1 Johns. Ch. 113 ; and on the last, *Smith v. Tankersley*, 20 Ala. 212, and *Tankersley v. Childers*, 23 *ib.* 781.

CLOPTON & LIGON, *contra*, insisted that the rule invoked by appellant applies only to bills for partition of land, and does not extend to applications for partition of slaves ; and cited *Edwards v. Bennett*, 10 Ired. 361.

RICE, J.—We shall notice only the point made in the argument of appellant's counsel. That point is, "that the title of complainant in the slave, in which partition is sought by the bill and decreed by the chancellor, is denied in the answer of the defendant ; and such being the case, the court cannot go on and decree partition, but will at once dismiss the bill, or, perhaps, direct an issue at law to be tried."

We may concede, that in a bill for partition of land, if the defendant denies the title of the plaintiff, and sets up an adverse possession and a title in himself in severalty, the court of chancery will not proceed, until the plaintiff establishes his title by an action of ejectment. But the reason for this rule is, that a tenant in common of land may bring ejectment against his co-tenant, when there is an actual ouster ; and such denial and claim set up in the answer is taken to be an actual ouster.—*Edwards v. Bennett*, 10 Iredell's R. 361 ; *Delony v. Walker*, 9 Porter's R. 497 ; 2 *White & Tudor's Leading Cases*, part 1, top pages, 531 to 538.

This reason, and the rule founded on it, cannot be applied as between tenants in common of a *slave*: one of such tenants cannot maintain an action at law to try or establish his title, against his co-tenant, whilst the latter continues in the possession of the slave.—*Parminster v. Kelly*, 18 Ala. 716; *Edwards v. Bennett*, *supra*.

If the above mentioned rule, as to tenants in common of *land*, were applied to tenants in common of slaves, there would be no remedy in any court for the latter class of tenants, whenever the tenant holding the actual possession denied the tenancy in common or the title of his co-tenant. "Where there is a right, some court must be empowered to make it effectual." Partition by tenants in common of chattels, could not be had in the common-law courts: they had to go into the courts of equity, to effect that object.—*Irwin v. King*, 6 Iredell's R. 219.

Without deciding anything as to a bill for partition of land, we hold, that a mere denial by the defendant, to a bill for partition of a slave, of title in the complainant, is, by itself, no ground for dismissing the bill, or for directing an issue at law to be tried.—*Overton v. Woolfolk*, 6 Dana's R. 374; *Edwards v. Bennett*, *supra*.

Having now decided the point made by the appellant adversely to him, we wish it understood that our decision is confined to that point. Decree affirmed, at the costs of the appellant.

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## COWAN AND WIFE vs. JONES.

[BILL IN EQUITY BY DISTRIBUTEES IMPEACHING FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS ON THE GROUND OF FRAUD.]

1. *Final settlement, when attacked for fraud, not opened on proof of errors or mistakes.*  
A decree of the Orphans' Court, rendered on the final settlement of an administrator's accounts, previous to the act of 1850, conferring jurisdiction on chancery to overhaul such decrees, will not be opened in equity, when impeached for fraud, on proof of an error or mistake in the allowance of a

credit for money paid to a guardian after the revocation of his letters of guardianship; it being shown that the complainant, then an infant, was represented on the settlement by a guardian *ad litem*; that the payment was made in good faith, for the ward's accommodation, and in accordance with her wishes at the time; and it not appearing that the facts were concealed from the court.

2. *Distinction between opening an account and surcharging and falsifying it.*—When an account is opened on the ground of fraud, the whole of it may be unraveled; but where permission is merely given to surcharge and falsify, the account stands as *prima facie* correct, and the *onus* of proving mistakes is on the party alleging them; and therefore, where a bill is filed to impeach a decree on the ground of fraud, if the answer denies all fraud, but admits an error or mistake, the complainant cannot have a decree unless he amends his bill.
3. *Amount too small to uphold jurisdiction of equity.*—The defendant in this case admitted in his answer that a balance of \$8 42 was due from him to complainants, but the bill was not sustained as to any of the other matters in controversy: *Held*, that this sum, of itself, was too small to justify a resort to equity, or to uphold its jurisdiction.
4. *Dismissal of bill without prejudice—Laches in failing to amend.*—The dismissal of a bill which seeks to impeach a decree on the ground of fraud, though no reservation be made of complainant's right to file another for the purpose of surcharging and falsifying the account on the defendant's admission of mistakes, does not prejudice that right; but if the practice were otherwise, the complainant's laches in failing to amend his bill would be a good ground for refusing to modify the decree on error, so as to dismiss the bill without prejudice.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

THIS bill was filed by the appellants against William G. Jones, as the administrator of Edward O. Branch, deceased, who was the father of Mrs. Cowan. Its material allegations, in substance, were as follows: That the defendant became the administrator of said decedent, by regular appointment from the Orphans' Court of Greene county, in October, 1838, and took possession of all the assets of his estate; that he settled up the estate in 1843, and paid off to all the distributees except Mrs. Cowan their distributive shares of the estate, which, according to the settlement made by him, was about \$1,000 over and above the property given to them; that said distributive share was, in fact, at least \$2,000, and a decree ought to have been rendered for that amount; that one Thomas P. Giles, who had married a daughter of said Branch, was appointed guardian of Mrs. Cowan, who was then an



infant about ten or twelve years of age, in Virginia, but his letters of guardianship were revoked on the — day of —, 1843; that the said Giles and defendant, contriving and fraudulently intending to injure complainant, and to have the benefit of her property, afterwards made a pretended settlement of said estate, and of complainant's interest in the same, and said Giles received from said defendant, as administrator as aforesaid, complainant's distributive share of said estate, and gave his receipt for the same, which the said Jones filed as one of his vouchers on said settlement, and the same was allowed by the court. "And complainants expressly charge, that at the time said settlement was made said Giles was not the guardian of said complainant, and that this was known to said Jones at the time; that said settlement was collusive, fraudulent, and grossly unjust, and that said Giles had no authority to make any settlement for complainant, or to receive any property belonging to her; that these facts were well known to said administrator at the time said settlement was made, and said court was deceived and imposed upon when it sanctioned said settlement; that said settlement was made without the knowledge or consent of complainant, and while she was a minor." The prayer of the bill is, that said pretended settlement with the Orphans' Court may be set aside and held for nought; that said administrator may be decreed to settle up said estate and pay over complainant's distributive share; and for general relief.

The defendant answered the bill, alleging, that on the 6th June, 1843, he filed his accounts and vouchers, in the Orphans' Court of Greene, for a final settlement of his administration on said estate; that Mrs. Cowan was made a party to this settlement by the appointment of a guardian *ad litem* for her; that notice of this intended settlement was duly given by publication, and the account was finally settled on the 9th November, 1843, and a final decree then rendered; "that before the rendition of this decree, but after the filing of his accounts and vouchers, respondent went to Virginia, where said Giles and his family (including his said ward) then resided, and took with him a copy of his account and the amount of money then due said ward as her distributive share, for the purpose of paying it; that the account was submitted to the said

Giles, as guardian, and he made no objection to it; that said Giles informed respondent at this time that he contemplated removing with his family to Missouri, and that his said ward wished to accompany them; that respondent afterwards heard that the sureties of said Giles, on his bond as guardian, in consequence of his intended removal, had required him to give counter security, and subsequently that his letters had been revoked on account of his failure to give such security; that said Giles represented to respondent that his ward was indebted to him on account of her support and maintenance, that she was anxious to accompany him and his family to Missouri, and that she could not do so without the money which respondent had carried to Virginia for the purpose of paying her; that respondent, being anxious to do nothing which could have even the semblance of a wish on his part to keep in his hands any money belonging to complainant, or to put her to any trouble or inconvenience, and at the same time not being willing to incur any risk in paying said money, did pay over said money (being \$750) to said Giles, on his executing an indemnifying bond with approved security, and took the receipt of said Giles for said money," &c.

The answer denies all fraud and collusion, and states that this payment was made, as respondent believed, in accordance with the wishes of complainant at that time, and for her accommodation; admits that, on his final settlement of said estate, which took place after said payment was made, the sum of \$8 42 appeared to be due from respondent, as administrator, to said complainant, as one of the distributees of said estate, for which a decree was rendered against him, and which he has always been ready to pay, though he has never tendered the money; admits, also, that in the stating of said account for final settlement, he accidentally omitted to charge himself with the sum of \$200, for so much money collected by him, and that complainant is entitled to one-seventh part of this sum; pleads in bar of this suit, except as to the two above-named items of \$200 and \$8 42, the decree of said Orphans' Court and the statute of limitations; and demurs to the bill for want of equity, as also for vagueness and uncertainty in its allegations.

The cause was submitted on bill and answer only, and the

chancellor rendered a decree dismissing the bill ; from which decree the complainants prosecute this appeal, and here assign the same for error.

DANIEL CHANDLER, for the appellants :

1. The account for final settlement was filed on the 6th June, 1843, was appointed to be heard on the 16th October, and was continued until the 9th November, 1843. After filing the account, Jones went to Virginia, taking \$750 with him with the intention of paying it over to complainant's guardian, for her benefit ; but before the payment was made, Giles's letters were revoked. Jones, knowing this, nevertheless paid to him the \$750, taking his receipt and a bond of indemnity with good security ; and after this he returns to this State, and settles up the estate on the 9th November, 1843. On this settlement, the amount in the hands of the administrator was \$8,605 40, and each distributee's share was \$1,229 34. In its decree the court says,—“Sarah Branch” (complainant) “having received \$470 92, as rendered in account, and since filing the account has received, by her guardian, Thos. P. Giles, the further sum of \$750, per receipt filed ; leaving in her favor a balance of \$8 42”, for which judgment is then rendered. The court evidently supposed, when it allowed this payment of \$750, that it had been paid to the guardian. Mr. Jones presented the guardian's receipt ; and having no reason to suppose that his letters had been revoked, the court allowed the payment, and passed the account. It was the duty of the administrator to have informed the court of the circumstances under which the money was paid—that it was paid after the revocation of Giles's letters, and when the ward, being only fifteen years of age, was incapable of acting for herself. Of the neglect of this duty the complainant finds fault, and for this reason she charges that “the court was imposed upon and deceived when it passed the account, and that the settlement was unjust and fraudulent.” Before Mr. Jones can claim protection under that decree, he must show that the settlement was fair and legal, and that the court, with full knowledge of the facts, approved his act. But when he admits that he paid the money to Giles after he knew his authority to receive it had been revoked, that he took his



receipt as guardian when he knew he was no longer guardian, and that he presented that receipt to the court without any explanation of that fact,—such a settlement ought to derive no support from the fact that the court, in ignorance of these circumstances, passed the account, and sanctioned the payment. No one can believe that the court, had these facts been known, would have sanctioned the payment to an insolvent man after the revocation of his letters. Courts are the guardians and protectors of minors and their property. The decree is not conclusive on this court: it can be opened and impeached, and, if fraudulently obtained, will be set aside.—2 Story's Equity, § 1522; Cooper's Equity, 266; Mitford's Pleading, 93; 4 Johns. Ch. 199; Taylor v. Benham, 5 How. (U. S.) R. 233.

2. The defence that this \$750 was paid to Giles for the benefit of Mrs. Cowan, and with her knowledge and concurrence, is not available. The evidence shows that Giles got the benefit of it—that it was used by him to remove himself and family to Missouri. Moreover, being under age, her conduct, while under the control and influence of her guardian, amounts to nothing. The evidence shows that she was informed she could not go with her sister to Missouri, unless this money was paid over. This threat was a kind of moral coercion, and the consent thus given cannot deprive her of her rights; in truth, she was incapable of giving a binding consent, or of assuming the responsibility of such an act. All such arrangements to the prejudice of a minor are received with great suspicion.—1 Story's Equity, §§ 240, 322; 9 Ves. 297; 1 *ib.* 220; 14 *ib.* 299; 5 Ala. 94.

3. The decree should be in favor of complainant, exclusive of the \$750, for the \$8 42 balance on the decree, which the defendant admits is in his hands, and for one-seventh of the \$200, which he states was omitted from his account. The first item, though small, is not so small as to come within the influence of the principle, '*De minimis non curat lex.*'—32 Maine R. 119. The item of \$200 was omitted from the settlement, and the complainant knew nothing of it until the filing of the defendant's answer, in which the omission was admitted.



HOPKINS & JONES, *contra*, made the following points:—

1. The bill shows that there had been a final settlement of the administrator's accounts in the Orphans' Court of Greene county. This was known to complainants; and the account, being of record, was accessible to them. It was at least *prima facie* correct, and could only be impeached by bill to surcharge or falsify the account. Such a bill must state the particular items alleged to be omitted or false; and if it does not, it is demurrable. This bill does no such thing, and is therefore bad on demurrer.—7 Johns. Ch. R. 69–77; 2 Edw. Ch R. 293; 1 Ired. Ch. R. 403.

2. The case made by the bill is denied by the answer, and no proof was taken to sustain it. Even if the answer admitted a good case for complainants, it is wholly different from that stated in their bill, and therefore cannot avail them. If they had wished to avail themselves of it, they should have amended their bill; otherwise they cannot have a decree.—Story's Equity Pleadings, §§ 257, 264; Gresley's Eq. Evidence, 22–3; 1 Daniel's Ch. Pr. 377, note; 4 Port. 307; 1 Ala. 330; 13 *ib.* 593, 695; 19 *ib.* 398; 20 *ib.* 768; 3 Peters, 207; 11 *ib.* 249; 2 How. (U. S.) R. 338–43.

3. The Orphans' Court of Greene, in which the administrator's accounts were regularly and finally settled, unquestionably had jurisdiction of the matter. The complainant Sarah was regularly made a party to that settlement, by due notice and the appointment of a guardian *ad litem*. That she was a minor, makes no difference: being represented by guardian *ad litem*, she is as much bound by the decree as if she had been an adult.—1 Daniel's Ch. Pr. 205; 7 Missouri R. 426; 4 Dana, 429. The decree is binding and conclusive on her, and cannot be collaterally impeached; it can only be impeached for fraud, or by a bill properly framed to surcharge and falsify the account.—Clay's Digest, p. 309, § 37; 2 Stew. 214; 16 Ala. 271; 17 *ib.* 717; 18 *ib.* 713.

CHILTON, C. J.—The complainants concede by their bill that a final settlement has been made by the appellee of the estate of his intestate, and it follows that, if such settlement is to stand, it is an end of this controversy. They charge, however, that this settlement was fraudulent—that

the Orphans' Court was deceived by the appellee, who claimed and obtained credit for alleged payments to one Giles, as guardian of Mrs. Cowan, when in fact he was not the guardian, but had, to the knowledge of appellee, been removed.

No proof has been taken to establish any fraud in obtaining the decree made upon the final settlement of the estate of Branch, and it is very clear that no imputation of fraud can be deduced legitimately from the record in the cause. The charges of fraud and collusion between the administrator and Giles, the alleged guardian, in respect of the payments made to the latter, wholly fall to the ground, and the answer of the defendant expressly denies all fraud or concealment in making the settlement in the Orphans' Court. For aught that we can know, the Orphans' Court of Greene county was fully apprised of all the circumstances attending the payment; and, although its action may have been erroneous, this furnishes no ground for impeaching the decree in chancery; the settlement having been made before the act of the legislature conferring upon the Chancery Court power to overhaul decrees rendered by the Probate Courts. The mere fact that the \$750 were paid to Giles after the letters of guardianship to him had been revoked, it appearing that it was paid in good faith, and for the ward's accommodation, and in accordance with her wishes at the time, is not sufficient to open a decree which allows it, the circumstances of the payment not being concealed from the court.

The complainant was duly represented by guardian *ad litem* upon the final settlement; and if any error intervened in allowing the payment of the \$750, this should have been presented by a bill of exceptions, and does not render the settlement void.

It is insisted, however, that the appellee admits a mistake has intervened, in the settlement which was made with the Orphans' Court, of \$200; one-seventh of which sum, it is alleged, belongs to the complainants. As it respects this sum, we think that, upon well-settled principles of equity, no decree can be rendered for it upon the present bill. The answer admits, that through mistake, two hundred dollars were omitted out of the final settlement. To that extent, the account then had, as confirmed by the decree, was erroneous.

No attempt was made to amend the bill ; but the complainants continue to urge the ground first assumed by them, that by reason of fraud the whole decree should be opened.

The rule is settled, that where errors or mistakes only are shown to exist in the account, the account will not be opened, as will be done where fraud is shown, but the party alleging the error or mistake in the account will be permitted to surcharge and falsify it.—Danl. Ch. Pr. p. 764 ; Story's Eq. Jurisp. § 523 ; 1 John. Ch. R. 550 ; Vernon v. Vawdry, 2 Atk. R. 119. The distinction between opening an account, and surcharging and falsifying it, is important ; because, when opened, the whole of it may be unraveled ; but when permission is given merely to surcharge and falsify, the onus is upon the party who alleges mistakes to prove them. The account, *prima facie*, stands as correct ; and if the party can show an omission for which he should have a credit, it is added (surcharged) ; or, if a wrong charge has been made against him, it is deducted, which is called a falsification. As the bill before us does not contain any allegation of mistake or errors as the basis for an order to surcharge and falsify the admission in the answer that a mistake exists cannot entitle the complainants to a decree. The decree must be made upon the allegations of the bill—upon *the case made by the bill*, and the title to relief therein asserted must be substantially shown. The court pronounces its decision, it is said, *secundum allegata et probata* (Story's Eq. Pl. § 500), so that no relief can be granted for matters not charged, although they may appear in other parts of the pleadings and in evidence.—See 1 Danl. Ch. Pr. pp. 377–378, note 2, and cases there cited ; also, McKinley v. Irvine, 13 Ala. R. 593, 695 *et seq.* ; Evans v. Battle, 19 *ib.* 398 ; Paulding v. Lee & Ivey, 20 *ib.* 753–758.

.It follows, that as there is no fraud as alleged, and the bill is not framed to surcharge or falsify the account as settled by the decree of the Orphans' Court of Greene county, the complainants are barred by the decree, which is valid and conclusive until it is impeached in some of the modes pointed out by law ; and they cannot, therefore, have a decree for the two hundred dollar item set forth in the answer. The decree is final until opened, or leave obtained in some way to

overhaul items which are, or should have been, embraced in it.—*Cole v. Connelly*, 16 Ala. R. 271; *Cox v. Davis*, 17 *ib.* 714–717; *Sankey's Distributees v. Sankey's Ex'rs*, 18 *ib.* 713.

As to the pittance due upon the final settlement, it is too insignificant to justify a resort to equity, or to uphold its jurisdiction; and it is not attempted by the appellants' counsel to sustain it solely for that sum.

It would, perhaps, have been well for the chancellor to have dismissed the bill without prejudice to filing another to recover for the share due the complainants of the \$200; but we think their right is not foreclosed by the present bill, which makes a different case from a bill which would seek the attainment of that object. If, however, their right to a new bill would be prejudiced, we should not reverse for this reason, since they had ample opportunity to amend their original bill, making it one with a double aspect, so as to embrace the correction of this mistake, and they failed to do so. Their laches would be a good ground for refusing such modification.—*Rumbly v. Stainton and Wife*, 24 Ala. R. 712.

Let the decree be affirmed.

### LEAIRD vs. MOORE.

[ACTION ON PROMISSORY NOTE—CONSTRUCTION OF STATUTE OF AMENDMENTS,  
CODE, § 2403.]

1. *Sole plaintiff's name cannot be stricken out and that of another substituted.*—Under the statute authorizing amendments of the complaint (Code, § 2403) "by striking out or adding new parties plaintiff, or by striking out or adding new parties defendant," the court cannot allow the name of a sole plaintiff to be stricken out and that of another person to be substituted.

APPEAL from the Circuit Court of Barbour.

The record does not show the name of the presiding judge.

THIS was an action under the Code on a promissory note for \$210, executed by the defendant, Lewis J. Leaird, and



Leaird v. Moore.

payable to William Smitha, or bearer. The original complaint was in the name of J. C. Wellborn as plaintiff, and it was averred that the note was his property ; but at the Spring term, 1854, after the cause had been pending one year, his death was suggested, and Mary A. Wellborn, as his executrix, was made a party plaintiff ; and at the same term another order was made in the cause, as follows : " Upon motion of Kelly Moore, the complaint is amended in this case, by adding the said Kelly Moore as a new party plaintiff, and also amended by striking out the plaintiff, Mary A. Wellborn, executrix ; and the defendant, by his attorney, excepts to the ruling of the court.'

" The action of the court in permitting a change of parties plaintiff," is now assigned for error.

E. C. BULLOCK, for the appellant, contended that the statute authorizing amendments of the complaint (Code, § 2403), being in derogation of the common law and the long established principles of pleading, must be strictly construed ; that its object, as evident from the language used, was to provide a remedy for the nonjoinder and misjoinder of parties, and it ought not to be extended by construction to the substitution of one party for another ; that if the amendment in this case was made by first adding the name of Moore, it was erroneous as a misjoinder of parties, and if it was made by first striking out the name of Mrs. Wellborn, there was nothing left to which the name of Moore could be added, and no case in court.

LEWIS L. CATO, *contra*, insisted that the statute must receive such a construction as would effectuate its object, which was (as he contended) to prevent cases from being thrown out of court for want of proper parties, or because improper parties had been made ; that the court had the power to allow separate amendments, by first adding Moore's name, and then striking out Mrs. Wellborn's, and there could be no objection to allowing the two amendments at one and the same time, and under the same motion ; and that the word "add", as used in the statute, did not refer to the party named in the complaint, but to the complaint itself.

GOLDTHWAITE, J.—By the Code (section 2403) the courts are required to permit the complaint to be amended, “by striking out or adding new parties plaintiff, or by striking out or adding new parties defendant, upon such terms and conditions as the justice of the case may require.” The only question is, whether, under this section, the sole plaintiff can be struck from the record, and another person substituted in his place. Judging from its language, we think the object of the statute was, to cure defects arising from a nonjoinder or misjoinder, without turning the case out of court. The words do not naturally go further than this; and they should do so, before we would be authorized to allow a change so radical to be made by amendment. The statute is in derogation of the common law; and if the sole plaintiff is struck out, there are no parties, and, consequently, no case. If we were fully satisfied that it was the intention of the statute to go so far, the words might, perhaps, authorize us to give effect to that intention; but we could not do so without going beyond their plain and literal meaning; and we think it is better to adhere to the plain meaning of the words, unless such a construction leads clearly to a wrong result. It is impossible for us to say that the legislature, when it used the words “adding new parties,” meant substituting a different party altogether; and if the latter was intended, it is better that the alteration should be made by the legislature, than that the judges, by construction, should run the risk of extending the statute to cases which it is at least very doubtful whether it was intended to reach.

Judgment reversed, and cause remanded.

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### ROWAN vs. HUTCHISSON.

[DETINUE AGAINST SHERIFF FOR SLAVES TAKEN UNDER ATTACHMENT.]

1. *Declarations of ownership, unaccompanied by possession, not admissible evidence.*—Declarations of ownership of a slave, made by a party who is not shown to

have had possession at the time, are not admissible evidence for him in a suit involving the title.

2. *Declarations of slaves inadmissible on question of ownership.*—The declarations of an old female slave, who lived at the same house with her grandchildren, respecting her possession of them, are not admissible evidence on the question of ownership, since (other reasons aside) she cannot have such possession as will authorize their admission.
3. *Admissibility of other evidence to prove ownership.*—In detinue against a sheriff for slaves taken under attachment, the question was whether the slaves belonged to plaintiff, or to his brother, the defendant in attachment, who had gone to California before the levy of the attachment, leaving the slaves in the house in which he last resided: *Held*, that defendant, to repel the idea of abandonment on the part of said defendant in attachment, and to show title in him, might prove that, while in possession of said slaves, he had mortgaged them; that when the steamboat on which he left was about quitting the wharf, he declared his intention soon to return; and that plaintiff, after his brother's departure, had returned an assessment under oath of his own property, in which said slaves were not included.
4. *Deed received in evidence as an admission in writing.*
5. *Charge respecting the effect of three years possession of personal property, under statute of frauds, held correct.*
6. *When damages assessed to defendant.*—If the plaintiff in detinue, by giving the statutory bonds, causes the possession of the slaves sued for to be taken from the defendant and turned over to himself, the jury trying the case are authorized by the act of 1848, "to amend the law in relation to the action of detinue," (Pamphlet Acts 1847-8, p. 82,) to assess the damages and the value of the slaves.
7. *Judgment on verdict for defendant.*—Issues being joined on the pleas of *non detinet* and justification under legal process, a verdict finding the defendant not guilty, and assessing the damages and the separate value of the slaves, is sufficient under this statute to support a judgment in his favor.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

DETINUE by B. C. Rowan against James F. Hutchisson, for two slaves—Tom, about seven years old, and Mary (*alias* Louisa), about nine years old; pleas, *non detinet*, and justification under certain attachments sued out by third persons against Michael M. Rowan, a brother of plaintiff, and levied by the defendant, as sheriff of Mobile county, on said slaves as the property of said Michael. The record shows that the plaintiff executed the statutory bond, and that the slaves were thereupon delivered into his possession.

On the trial of the cause, as appears from the bill of exceptions, the plaintiff offered the deposition of his sister, Maria

L. Rowan ; attached to which, as an exhibit, was a bill of sale, signed by A. A. Rowan, a brother of plaintiff, dated at Courtland, Alabama, April 27, 1843, and purporting to convey to plaintiff, in consideration of the sum of \$1,350, the following slaves : Mary, about 44 old ; Susan, about 18 years old, and her infant child, Mary ; Daniel, about 15 years old ; and Chaney, about 12 years old. This witness testified, that Tom and Mary (the slaves here sued for) are the children of said woman Susan, who was the daughter of said Mary mentioned in said bill of sale ; and that said bill of sale was in the handwriting of said A. A. Rowan. The bill of exceptions states, that the plaintiff also offered said bill of sale in evidence, " without any other evidence thereof than that contained in said deposition."

" In 1844," as the bill of exceptions then states, " Susan and some other negroes were landed at the wharf in Mobile, from a steamboat, and were taken by plaintiff, he claiming them as his own, into the country about three miles from Mobile, to the place where he and his brother Michael were residing together. A. A. Rowan, at and previous to that time, resided in Huntsville, Ala. It appeared that plaintiff married in 1845, or 1846, and Michael M. Rowan removed from the country into the city of Mobile ; and a few days afterwards, Susan, Mary, Tom, and Louisa were brought into town, (but by whom was not shown,) to the house Michael lived in,— Mary being his cook, and the others waiting on him. One Jennett testified, on behalf of plaintiff, that he knew the negroes in controversy at plaintiff's house in the country, and had seen them there often six or seven years ago ; that Michael M. Rowan then resided there, and that he had not (so far as recollected) seen the slaves there since Michael left ; that he had often been at plaintiff's house, and was connected with him by marriage ; that Michael went to California two or three years before this trial, where he now is ; that he had often seen said slaves living in a house on Cedar street, Mobile, and had seen them in the possession of plaintiff since this suit was brought."

One Meaher testified, on behalf of plaintiff, that he knew said slaves, who resided near him on Cedar street a year or two since ; that plaintiff, in going in and out of the city on his



route home, passed his house and that in which the slaves lived almost daily; that plaintiff stopped at his house very frequently, and sometimes stopped at the house where the slaves lived, and frequently spoke to them on such occasions; and that sometimes, though less frequently, witness also saw Michael Rowan on the premises, who was engaged as a clerk in the house of Desha & Co., which kept him occupied from an early hour in the morning until late at night. "Plaintiff then proposed to ask this witness to state any declarations he had heard (if any), while said slaves were residing in Cedar street, made by plaintiff in regard to his ownership; to which question defendant objected; which objection was sustained by the court, and plaintiff excepted. Plaintiff then proposed to prove the declarations of said woman Mary, as to how she held possession of Tom and Louisa at the time; which question was objected to, the objection sustained by the court, and plaintiff excepted."

"One Sturdevant testified, for plaintiff, that he knew the slaves, had frequently seen them at plaintiff's house, and did not know until a year or two since that they were in the city; that he was census-taker in 1850, and as such called upon plaintiff; that plaintiff gave in his slaves at the time, having called them forward for witness to see them, at plaintiff's house; was not positive that Tom and Louisa, or Mary, or Susan, were there; was with plaintiff on several occasions when he stopped at Meaher's house, and saw the slaves at the house on Cedar street with the slave Mary. Plaintiff proposed to ask this witness for his (plaintiff's) declarations, or the declarations of the negroes, in regard to the ownership of said slaves when witness thus saw them in Cedar street; which question was objected to, the objection sustained by the court, and plaintiff excepted. Plaintiff then proposed to prove by him the declarations of the slave Mary, upon the same point; which was objected to, the objection sustained, and plaintiff excepted.

"On the part of defendant it appeared, that soon after M. M. Rowan separated from plaintiff, (they having kept house together as bachelors until the marriage of the latter,) the slaves referred to (Mary, Susan, Chaney, and the children in controversy) also came to town, and removed from house to

house with M. M. Rowan as his servants,—he occupying such houses, and lodging in them at night, and taking his breakfast and supper there ; that two of them died in the city in the possession of said Michael, and the others remained where he left them ; that plaintiff, as assessor of the State and county taxes in the year 1849, had assessed to said Michael, in the city of Mobile, five slaves about or nearly corresponding in ages with those named ; that in 1852, when such of said slaves as were then living were still in Mobile, and after said Michael had gone to California, plaintiff was one of three assessors of taxes in the city of Mobile for that year ; and as such did not render in or assess himself any slaves, although he rendered in and assessed to himself other property in said city ; and the books of these assessments, after one of them was shown to have been made by the plaintiff, as assessor, in his own handwriting, and the others to have been made under the supervision of plaintiff and the other assessors, and that the assessments of property to plaintiff were made upon his own information, and given when all three of the assessors were together, were offered on behalf of defendant, so far as these assessments were set forth, and were objected to by the plaintiff. The objection was overruled by the court, and thereupon plaintiff excepted.

“ Defendant then offered to prove, that Michael Rowan, in 1849, mortgaged these slaves to the Bank of Mobile, to show an act of ownership by him ; to which the plaintiff objected, his objection was overruled, and plaintiff excepted.

“ It having been proved by plaintiff that nine or ten slaves had been assessed as his property in the county, defendant offered in evidence a deed from plaintiff to one A. H. Ryland, conveying to him nine slaves other than those in controversy, as security for the performance of a contract ; to which plaintiff objected as irrelevant, but his objection was overruled, and he excepted.

“ Defendant proved the execution of two notes, amounting to \$1,500, made by said Michael Rowan in the year 1849, as those on which one of the attachments issued, by virtue of which defendant, as sheriff, had taken the negroes in controversy into possession, and offered them in evidence ; to which plaintiff objected, but the objection was overruled, and plaintiff excepted.

"Defendant then proved, that, as sheriff of Mobile county, he had levied two attachments upon the negroes in question; that he found them where Michael Rowan had left them when he left Mobile; and their value. He then offered to prove the declarations of said M. M. Rowan, while on the steamboat, just as the steamer was leaving the wharf, when he left for California, as to his intention soon to return to Mobile, and that he was not leaving to remain away permanently; to which plaintiff objected, the objection was overruled, and plaintiff excepted.

"It was admitted, that plaintiff was now, and had been since a short time after the commencement of this suit, in possession of the slaves in controversy, under the bond which he had given to obtain them.

"The court charged the jury, among other things, that if they believed from the evidence that the slaves sued for were the property of Michael Rowan, or of Michael and plaintiff jointly, or that Michael had been in possession of them, as his own, for three years next before the levy of the attachment, without any registration or record having been made, or notice had of any claim or right of plaintiff in them, they ought to find for the defendant; and that if they found for the defendant, they ought to find what was the value of each slave, and also what damage (if any) defendant had sustained by plaintiff's possession of them since the commencement of this suit. To these charges the plaintiff excepted."

The jury returned a verdict in these words: "We, the jury, find the defendant not guilty, and assess the damages \$963 60. We assess the value of the slaves as follows—Tom \$500, Louisa \$400"; and on this verdict the court rendered judgment in favor of the defendant, for \$43 60 damages, and the slaves or their alternate value as assessed by the jury.

The rendition of this judgment, together with all the other rulings of the court above stated, is now assigned for error.

E. S. DARGAN and P. HAMILTON, for the appellant.

PERCY WALKER, *contra*.

RICE, J.—The evidence does not show that the slaves ever, were in the possession of the plaintiff, after they went

into the service and control of Michael, in the city of Mobile, in 1845 or 1846 ; but, on the contrary, there is a preponderance of evidence in favor of the proposition, that the possession of these slaves by Michael was continuous from 1845 or 1846, until the levy of the attachments, made after he had gone to California. All the declarations of the plaintiff as to his ownership of the slaves, offered in evidence by him, were properly rejected, upon the ground that at the time he made these declarations he was not in possession of the slaves. *Thomas v. De Graffenreid*, 17 Ala. 603.

Upon the same ground, (without alluding to any other,) the declarations of the slave Mary, as offered in evidence by the plaintiff, were properly excluded. It is clear from the evidence, that although the other slaves may have lived with Mary, or at the same house where she lived, yet she and the other slaves were under the control of Michael Rowan ; and that she had no possession of any of the slaves, which could authorize the court to admit any of her declarations as to ownership or possession, as evidence for the plaintiff in this cause.

Under the issue in this case, the defendant had the right to prove, that although the bill of sale for the slaves, upon its face, showed the title to them to be in the plaintiff, yet the actual title and ownership were in Michael Rowan, and that he had not abandoned them. In this point of view, it was proper to allow the evidence as to the assessments of property to the plaintiff made upon his own information in 1852, after Michael had gone to California ; and also the evidence that Michael, in 1849, and whilst he had possession of the slaves, had mortgaged them to the Bank of Mobile ; and that when he left for California, just as the steamer was leaving the wharf, he declared his intention soon to return to Mobile and not to remain away permanently. This evidence, in connection with the other evidence in the cause, certainly tended to show that the slaves were the property of Michael, and not the property of the plaintiff, and that Michael had not abandoned the slaves.

After the plaintiff had proved that nine or ten slaves had been assessed to him in Mobile county, it was proper to allow the defendant to prove any admission of plaintiff that he



owned at the time nine slaves other than those in controversy. The deed of plaintiff to A. H. Ryland, read in evidence, was an admission in writing by plaintiff to that effect, and was therefore admissible.

We cannot conceive of any good ground of objection to the introduction of the two notes of Michael Rowan, after it had been proved that they were executed by him in 1849, and that these were the notes on which one of the attachments issued, by virtue of which the defendant, as sheriff of Mobile county, had taken the negroes in controversy into possession.

The only objection made by the argument for appellant to the charge of the court, is, that in effect, it excludes an examination of plaintiff's title to the slaves. Concede this objection to be true in point of fact, yet it is unavailing in point of law; for, although the title to the slaves was in the plaintiff, yet, if he permitted them to remain in possession of his brother Michael for three years next before the levy of the attachment, and as shown in the evidence and supposed in the charge, he could not recover in this case.

When, as in this case, the plaintiff in an action of detinue, by giving the bonds required by statute, causes the possession of the slaves to be taken from the defendant and turned over to him, during the pendency of the suit, if the jury trying the case find for the defendant, they are authorized by the act of 10th of February, 1848, (Pamph. Acts of 1847-8, p. 82,) to assess the damages and the value of the slaves.

Bearing in mind this statute and the issues in this cause, it is clear, the verdict, finding the defendant not guilty, and assessing the damages and the separate value of the slaves, is sufficient to support a judgment in his favor. The fair and necessary construction of it is, that the defendant did not do what is alleged against him in the plaintiff's declaration, and that the jury negative the right of recovery asserted by the plaintiff. The jury could not have found such a verdict, unless the plaintiff had failed in proving his right to a recovery. The meaning of the finding is plain, and the only fault is in the form.—*Tippen v. Petty*, 7 Por. R. 218; *Law v. Merrells*, 6 Wend. R. 272; *Hawks v. Crofton*, 2 Burr. R. 698; *Cro. Eliz.* 157; 6 Com. Dig., tit. Pl. (S. 26.)

There is no ground for reversal. Judgment affirmed.

WILEY, BANKS & CO. *vs.* KNIGHT ET AL.

[BILL FOR INJUNCTION BY MORTGAGEE AGAINST JUDGMENT CREDITORS OF  
MORTGAGOR.]

1. *Notice to agent implied from circumstances.*—Complainants, having a large claim, past due, on a mercantile firm then on the eve of insolvency, placed it, for collection or security, in the hands of an attorney at law who resided in the same town with the debtors. The attorney, although he did not know positively that the debtors were in failing circumstances, knew that a mortgage for a large debt covered their property, that there were other demands existing against them, some of which were in his own hands for collection, and for which he had endeavored to obtain collateral security, and that the balance of the notes and accounts due the firm, which had not been transferred to others, was almost worthless; and knowing these facts, he took from them, as the best security he could obtain for his clients, a mortgage on all their property, containing terms very beneficial to the debtors: *Held*, that these circumstances were sufficient to charge him with implied notice of the debtors' insolvency.
2. *Notice to agent is notice to principal.*—If notice, actual or implied, is brought home to an agent or attorney, it is immaterial whether the principal had personal knowledge of the fact; since the principal is presumed, both at law and in equity, to know whatever his agent knows.
3. *Mortgage taken by bona fide creditor, with implied notice of debtor's insolvency, conveying all his property, and containing terms beneficial to him, held fraudulent and void as to other creditors.*—A bona fide creditor, whose debt was past due, and who was charged with implied notice of the insolvency of his debtors, took from them, as the best terms he could obtain for his security, a mortgage on all their property of whatsoever description—to-wit, all their partnership effects, books, notes, and accounts; and all their individual property, consisting of lands and negroes, all the stock and provisions then on hand, or which might afterwards at any time be on hand, all the cotton and corn which might be produced up to the law-day of the mortgage, all farming utensils, and household and kitchen furniture. The law-day of the mortgage was postponed for nearly six years, the possession in the meantime remaining with the mortgagors; and it was shown that the property conveyed greatly exceeded in value the amount of the mortgage debt: *Held*, that the mortgage was fraudulent and void as to the other creditors of the mortgagors.
4. *When equity will control mortgages whose mortgage becomes oppressive.*—The principle that equity will control the action of a mortgagee, whose mortgage becomes oppressive to a third party, applies only to mortgages fairly made, and not to such as operate in the nature of assignments by insolvent debtors of all their property.
5. *Deed void as to third persons, good between parties.*—A deed which is fraudulent and void as to creditors whose debts are delayed, is nevertheless valid as between the parties themselves, and neither can set up the fraud to avoid it.

6. *Mortgage void for constructive fraud, not valid security in part.*—Where a part of the consideration of a mortgage, which is void for constructive fraud as against creditors, is the payment by the mortgagees of a previous incumbrance on a portion of the property, it cannot stand as a valid security for their reimbursement.
7. *General prayer does not authorize relief inconsistent with case made by bill.*—Under the general prayer for relief, complainants cannot have a decree inconsistent with the allegations of their bill; as where mortgagees ask the reformation of their mortgage and an injunction against judgment creditors of the mortgagor, and their mortgage is held fraudulent and void against such creditors—they cannot, under the general prayer, have established as a valid security in their hands a previous incumbrance on the property, which they allege was paid and discharged, and constituted a part of the consideration of their mortgage.

### APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by the appellants, asking the reformation of a certain deed of mortgage executed by J. A. & W. H. Knight, and an injunction against several judgment creditors of the mortgagors who had levied on the property. The mortgage, which was made an exhibit to the bill, is dated February 9, 1852, and the law-day is January 1, 1858. The debt secured is described as due by promissory note for \$9,500, bearing even date with the mortgage, and falling due on said January 1, 1858; and the property conveyed consists of 560 acres of land in Macon county, 160 acres in Chambers, a storehouse and lot in the town of Auburn, a contract with one Mahone for the purchase by him of a stock of goods at \$1,750, which were to be paid for in land; also, the books, notes, and accounts due the firm of J. A. & W. H. Knight, sixteen negroes, "all the cotton and corn which may be raised and produced by said J. A. & W. H. Knight until said debt is paid"; also, "all the stock and provisions now on hand, or which may hereafter be on hand to said January 1, 1858, which may consist of horses, mules, cattle, hogs, sheep, wagons, carts, farming utensils, household and kitchen furniture, one buggy, and one cotton gin."

The bill alleges, that the complainants are merchants residing in Charleston, South Carolina, and that said J. A. & W. H. Knight were a mercantile firm doing business at Auburn, Macon county, Alabama; that at the time said mortgage was

executed, the mortgagors were indebted to complainants, for goods previously sold, to the amount of about \$5,000 ; that they had previously executed a mortgage to one Wimberley on a part of said property, to secure a debt then due and owing from them to him of \$4,460 ; that said mortgage to Wimberley had been duly recorded, and was a valid and subsisting lien on the property covered by it ; that complainants, being wholly unable to obtain any security for their said debt without assuming said Wimberley's debt, did assume said debt, and have since paid a large portion of it, and hence the amount of their mortgage debt is these two debts combined ; that they made this arrangement with their said debtors from actual necessity, in good faith, and only because they could not obtain any other terms, and for the same reason they were compelled to allow the long credit stipulated in the mortgage.

The bill further alleges, that said mortgage, through the mistake of the attorney by whom it was drafted, does not contain all the provisions and stipulations which were intended by the parties to be inserted therein ; that it was intended to convey "the rents and profits, or crops of cotton and corn, annually accruing or produced by or from said property, with a further provision that said rents and profits were to be applied annually to the payment and extinguishment, *pro tanto*, of the interest accruing on said indebtedness," &c. It alleges, also, that several judgments have been recovered against said J. A. & W. H. Knight since the execution of said mortgage ; that executions have been issued on these judgments, and have been levied on the mortgaged property, &c. The prayer is for a reformation of the mortgage, an injunction against the judgment creditors, and for general relief.

All the defendants answered the bill, except the mortgagors against whom decrees *pro confesso* were entered ; insisting that the mortgage was fraudulent and void as to them, both in law and in fact, because made to hinder and delay creditors ; and demurring for want of equity.

The chancellor overruled the demurrer for want of equity, but dismissed the bill on final hearing ; holding that the complainants were chargeable with notice of the insolvency of



the mortgagors, that the mortgage was fraudulent and void in law, that it could not be reformed because of the fraud, and that it could not be set up by complainants as valid for any purpose. His decree is now assigned for error.

ELMORE & YANCEY, and J. E. BELSER, for the appellants :

I. The plaintiffs' mortgage is not fraudulent and void.

1. Fraud on the part of the mortgagor alone is not sufficient to invalidate a mortgage.—*Stover v. Herrington*, 7 Ala. 142; *Hooks v. Anderson*, 9 *ib.* 704; *Abercrombie v. Bradford*, 16 *ib.* 560; 3 Dana, 324; 12 B. Mon. 38; 6 *ib.* 608. The case of *Townsend v. Harwell*, 18 Ala. 304, rests on its own peculiar circumstances, and was controlled by the special verdict of a jury.

2. A creditor has the right to purchase the property of his debtor, or to take it in security for his debt; and the probability of other creditors getting the property, is a justifiable motive for the act.—*Ford v. Williams*, 3 B. Mon. 554; *Pearson v. Rockwell*, 4 *ib.* 299; *Copenheaver v. Huffaker*, 6 *ib.* 19; *Lee v. Flannagan*, 7 Ired. L. 471; *Kirtland v. Snow*, 20 Conn. 23; *Craig v. Tappin*, 2 Sandf. Ch. 78.

3. A distinction exists between a sale to satisfy a precedent debt, or a mortgage to secure it, and a mere purchase of property by the payment of an adequate consideration; but either, if *bona fide*, may be done.—*Hartshorn v. Eames*, 31 Maine R. 98; *Holbird v. Anderson*, 5 Term R. 235; *Pickstock v. Lyster*, 3 M. & Sel. 371; *Lee v. Flannagan*, 7 Ired. L. 474; *Andrews v. Jones*, 10 Ala. 400.

4. The corrupt or covinous motive with which a mortgage is made, or an act done, gives it a fraudulent character; and where the facts are susceptible of an honest intent, fraud will never be imputed.—*Shackelford v. Bank*, 22 Ala. 243; *Insurance Co. v. Pettway*, 24 *ib.* 544; *Gary v. Colgin*, 11 *ib.* 514; *U. S. Bank v. Huth*, 4 B. Mon. 431; *Copenheaver v. Huffaker*, 6 *ib.* 19; 8 Barb. S. C. R. 588; 7 Gill's R. 366; 8 Geo. 258; 14 Smedes & Mar. 30.

5. Mere indebtedness of the mortgagor at the time of the execution of a mortgage, of itself, is not evidence of fraud; nor is the pendency of suits conclusive as to a fraudulent intent.—*Frow v. Smith*, 10 Ala. 571; *Williams v. Jones*, 2 *ib.*

314; Doyle v. Sleeper, 1 Dana, 532; Reinhart v. Bank, 6 B. Mon. 254; Wilt v. Franklin, 1 Binney's R. 514; Beals v. Guernsey, 8 Johns. 348.

6. Possession by a mortgagor, *per se*, is not fraudulent; nor is it, in general, any evidence of fraud in fact.—Allen v. Montgomery Railroad Co., 11 Ala. 438; Snyder v. Hitt, 2 Dana, 204; North v. Crowell, 11 N. H. 251; Holbrook v. Baker, 5 Greenl. 312; Davis v. Evans, 5 Ired. L. 525; Claytor v. Anthony, 6 Rand. 304; 4 Comst. 303; 3 Mete. 515; 7 Wend. 279.

7. There is a difference, as to possession being left with the mortgagor, between an absolute sale and a mortgage. This difference, though abolished in some States, here remains in full force.—Allen v. Montgomery Railroad Co., 11 Ala. 438; P. & M. Bank v. Clarke, 7 *ib.* 765; Doane v. Eddy, 16 Wend. 527; Barrow v. Paxton, 5 Johns. 258; Bissell v. Hopkins, 3 Cowen, 166; Brinley v. Spring, 7 Greenl. 241; Tompkins v. Wheeler, 16 Peters, 106; Patten v. Smith & Shepard, 4 Conn. 450; Badlam v. Tucker, 1 Pick. 389; Cutter v. Copeland, 6 Shep. 127; North v. Crowell, 11 N. H. 251.

8. That the property conveyed was worth more than the amount of the mortgage debt, does not necessarily render the deed fraudulent. To take ample security, especially where some of the property may die, is no sign of fraud.—Borland v. Mayo, 8 Ala. 117; Andrews v. Jones, 10 *ib.* 418; Young v. Stallings, 5 B. Mon. 308; Crosby v. Huston, 1 Texas R. 233; Downs v. Kissam, 10 How. (U. S.) 102.

9. The payment of the Wimberley mortgage shows the true motive of the appellants in taking their deed, and is a strong circumstance in favor of the fairness of their mortgage. Ford v. Williams, 3 B. Mon. 558; Brown v. Smith, 7 *ib.* 361; Brown v. Foree, *ib.* 358.

10. The mortgage is not fraudulent on its face, nor is it rendered fraudulent by the circumstances.—Pope & Son v. Wilson, 7 Ala. 693; Planters' Bank v. Borland, 5 *ib.* 541; Borland v. Walker, 7 *ib.* 269; Allen v. Railroad Co., 11 *ib.* 437; Andrews v. Jones, 10 *ib.* 400; Frow v. Smith, *ib.* 571; Ticknor v. Wiswall, 9 *ib.* 305; 5 Humph. 612; 12 Ill. 261; 1 Texas, 203; 6 B. Mon. 608; 7 Ired. L. 471.

11. There is not a particle of evidence tending to prove

actual fraud ; on the contrary, the evidence of Reese shows that the mortgage was accepted as a dernier resort, and only after repeated and unsuccessful efforts to obtain better terms.

12. The inference drawn by the chancellor, that appellants knew the embarrassment of their debtors when they took their mortgage, cannot be sustained.—Anderson v. Hooks, 9 Ala. 705 ; Borland v. Mayo, 8 *ib.* 116 ; Stanley & Elliott v. The State, 26 Ala. 26.

13. But, even if the insolvency of the mortgagors had been known to appellants at that time, this would not vitiate it, if other circumstances showed it to be fair on their part.—Allen v. Railroad Co., 11 Ala. 437 ; Ticknor v. Wiswall, 9 *ib.* 305 ; Hindman v. Dill, 11 *ib.* 689 ; Frow v. Smith, 10 *ib.* 571 ; 9 Sm. & Mar. 394.

II. If a mortgage, fairly made to one creditor, becomes oppressive to another, a court of equity will so control the former as to prevent injury to the latter. The defendants in this case, as judgment creditors of the mortgagors, can proceed by bill in equity to have the property sold under or subject to the mortgage ; and having this right, they cannot complain of the six years' credit, which injures the mortgagees only.—Pope & Son v. Wilson, 7 Ala. 697 ; Dubose v. Dubose, *ib.* 236 ; Chambers v. Mauldin, 4 *ib.* 477 ; Davis v. Evans, 5 Ired. L. 525 ; 7 Peters, 615 ; 7 Ired. 477.

III. But if the mortgage to the appellants should be held constructively fraudulent as to the other creditors, then the sum advanced by them on the Wimberley mortgage should be refunded to them, or they should be allowed to set it up as a security for the money paid by them on it. If it had not been discharged, their right thus to use it, as equitable assignees, would be indisputable ; and the only question now is, whether it is consistent with equity and good conscience that they should be repaid the money advanced by them on a *bona fide* incumbrance, or the other creditors be allowed to appropriate their money. In courts of law, the general doctrine is, that a deed invalid in part is void altogether ; but there are some exceptions to this rule even at law. Courts of equity, however, are not bound by any such rigid rules, but act according to the equities of the case. When a fraud was in fact intended, equity will give no relief ; but when the circumstances

are only suspicious, or where the transaction is only constructively fraudulent, the court will allow a satisfied deed or incumbrance to be set up as a security for reimbursement, provided it effects substantial justice. This is the result of all the cases.—Boyd v. Dunlap, 1 Johns. Ch. 482; James v. Johnson, 6 *ib.* 425; Burnett v. Denniston, 5 *ib.* 41; Mills v. Comstock, *ib.* 220; Towle v. Hart, 14 N.H. 61; Hatch v. Kimball, 14 Maine R. 9; 2 Cowen, 246; Thompson v. Chandler, 7 Greenl. 377; Harvey v. Hurlbut, 3 Vermt. 561; Marshall v. Wood, 5 *ib.* 250; Lockwood v. Sturtevant, 6 Conn. 374; Herne v. Meers, 1 Vern. 465; How v. Welden, 2 Ves. (Sr.) 516; Kirkham v. Smith, 1 *ib.* 258; Forbes v. Moffatt, 18 Vesey, 384; Shrewsbury v. Shrewsbury, 1 *ib.* 233; Ld. Compton v. Oxenden, 2 *ib.* 264; Gardner v. Aston, 3 Johns. Ch. 53; 6 Gill & J. 230.

The other creditors, if they deny this right to appellants, place themselves in an awkward position. They are compelled to assume the ground, that this mortgage was discharged in such manner that appellants can, under no circumstances, be regarded as equitable mortgagees, or entitled to set it up in a court of equity; and this involves the proposition, that the payment to Wimberley, which was a part of the consideration of appellants' mortgage, was a valid transaction; and affirming the validity of this part of the transaction, they affirm the whole, and complainants are entitled to all the relief they ask.—Butler & Alford v. O'Brien, 5 Ala. 316; Sheppard v. Buford, 7 *ib.* 90; Firemen's Insurance Co. v. Cochran & Co., at present term. The defendants cannot set up this payment as valid to discharge the incumbrance, and then say it is void for the fraud.

CLOPTON & LIGON, and GEO. W. GUNN, *contra* :

I. The appellants' deed of mortgage is fraudulent in law.

Fraud in fact, or an express intent to commit a fraud, is not necessary, in order to render a conveyance fraudulent against creditors: if the effect of the conveyance is to hinder or delay them in the collection of their debts, it is fraudulent. *Montgomery's Executors v. Kirksey*, 26 Ala.; *Buck v. Sherman*, 2 Doug. 180. To justify a court in inferring that a deed was made with fraudulent intent, when no fraud in fact is



proved, at least two things must concur—there must be creditors, known to the parties, who may be hindered or delayed in the collection of their debts by the provisions of the deed ; and the necessary consequence of the deed must be to produce such delay or hindrance.—Pope v. Wilson, 7 Ala. 695. If these two things concur, whether apparent on the face of the deed, or shown by the evidence, the court will not further inquire into the *bona fides* of the intention.

The badges of fraud in law which attach to this deed, are,—

1. No schedule of the books, notes, accounts, &c., transferred, is annexed to the deed ; and no explanation of the omission is even attempted. Although this fact, of itself, is not evidence of fraud ; yet, unexplained, it adds weight to any other objection that may exist to the deed.—Cummings v. McCullough, 5 Ala. 334; Wiswall v. Ticknor & Day, 6 *ib.* 183.

2. Articles of property of a perishable nature, some of which must necessarily be exhausted in the use, are conveyed by the deed ; and many articles are conveyed, such as stock, household and kitchen furniture, the crops to be raised, &c., the use of which for six years would cause, if not entire destruction, at least great deterioration in value. How is the stock to be fed, and how are the mortgagors and their families to be supported, if not from the crops? The evidence shows that they have no other means of support. This is a secret trust, or use, reserved to the grantor, which stamps the deed as fraudulent.—Raviesies v. Alston, 5 Ala. 302; Wiswall v. Ticknor & Day, 6 *ib.* 184; 9 *ib.* 308; Farmers' Bank v. Douglass, 11 Smedes & Mar. 540; 4 Yerg. 550; Elmes v. Sutherland, 7 Ala. 267.

3. Property not the subject of mortgage is conveyed by the deed—crops for six years not yet planted, and all the property owned by the mortgagors ; clearly evincing an intention to secure from seizure by their other creditors not only all they then had, but all they expected to make in six years.

4. The length of credit which was given, if not of itself, at least when taken in connection with the other circumstances, is sufficient to stamp the deed as fraudulent.—Pope v. Wilson, 7 Ala. 697; Johnson v. Thweatt, 18 *ib.* 744; Farmers' Bank v. Douglass, 11 Smedes & Mar. 539.

II. There is also evidence of fraud in fact.

III. The complainants can derive no benefit from their

payment of the Wimberley mortgage, which was a part of the original transaction, and vitiated by the same fraud.—*Tatum v. Hunter & Thomas*, 14 Ala. 557. The payment discharged the mortgage and destroyed the lien, and no subsequent act of the parties can revive or reinstate it. It cannot stand as a security in their hands for reimbursement of the sum paid on it.—1 Johns. Ch. 482; 4 *ib.* 598; 8 Vesey, 283; 1 Vermt. R. 465; *Bryan v. Young*, 21 Ala. 264; *Stokes v. Jones*, 18 *ib.* 734; *Johnson v. Thweatt*, *ib.* 741; 2 Carter's (Ind.) R. 189; 5 Gratt. 84; 13 Smedes & Mar. 348.

CHILTON, C. J.—The proof, which we have carefully examined, satisfies our mind, that at the time of the execution of the mortgage in question, the firm of J. A. & W. H. Knight was insolvent; and the circumstances are such as, when taken together, to fix notice of their inability to pay all their debts upon Wiley, Banks & Co. This last named firm resided in Charleston, where the Messrs. Knight had purchased their goods to carry on their mercantile concern, which was located at Auburn in this State, at which place they were largely indebted when the mortgage was given. Some of these debts were due in 1850, others in 1851, and the notes given for them had been protested. The demands due from them to the complainants were past due; one of them, for \$1280, being due for over 18 months anterior to the execution of this deed. Besides this, some seven thousand dollars of demands, existing in favor of Charleston merchants, were then actually in suit in Macon county; and one of the complainants was at Auburn in said county, where he remained near a week, doubtless endeavoring to collect the demands which he held against the Knights; shortly after which, the claims were sent to Mr. Reese, at Auburn, an attorney at law, for collection or security.

Now, although Mr. Reese, as he testifies, "did not know positively, at the time of the execution of the mortgage, that the Knights were in failing circumstances," he certainly had, as he testifies he presumes his clients, the complainants, had, reason to believe that such was their condition. He knew of the Wimberley mortgage for a large debt, which covered their property; he knew of other demands against them, and

himself had endeavored to secure them from collaterals ; he knew that the bond for the house in which they resided had been turned over to a creditor, for whom he was attorney ; that the debts, accounts, &c., due said firm, had been so culled over, as that the whole surplus remaining were almost worthless. Knowing all these facts, he certainly had very strong reasons to believe, what he swears he soon afterwards ascertained, that at the time he took this mortgage the Knights were insolvent. Mr. Reese does not state that he did not *believe, and had not sufficient evidence on which to found a rational well grounded conclusion*, that they were in failing circumstances : the contrary is fairly inferable from his testimony, and his conduct in the negotiation. It is incredible that, with a belief of their ability to pay their debts, this attorney would have manifested the zeal and energy, and would have submitted to the sacrifices, which were made to secure these mortgage debts, rather than sue upon the demand. According to his testimony, he "insisted and entreated that the Knights should execute to complainants a deed of trust, with power of sale, making the limitation of said deed the first of January, 1853 ; which the Knights refused. He then proposed different and shorter times than granted as shown by the mortgage ; but the Knights, particularly John A. Knight, who owned most or nearly all the property mentioned in the mortgage, utterly and positively refused to execute a mortgage, with powers of sale, and that unless complainants would grant six years, he would not sign any conveyance of his property ; and despite the entreaty of witness, the Knights refused any other terms than those granted as shown by the mortgage ; and that witness, rather than lose so large a debt, or even jeopard it, at length agreed, through necessity, to allow the time demanded." The Knights also required that the large debt to Wimberley should be paid, as a condition precedent to the execution of such security. It seems, therefore, that such was the necessity for securing the demands of complainants, that the Knights were allowed to dictate the terms,—terms which are irreconcilable with the idea that complainants believed that they could have collected their demands by suit at law. The truth is, that this agent thought he saw the cloud which threatened to overwhelm this firm,—

he saw the danger his clients were in, and, doubtless influenced solely by a laudable desire to save them, he was prepared to make sacrifices commensurate with the necessity for security ; and hence he submitted to the extraordinary terms required by the Knights, in order to obtain for them this deed.

It is wholly immaterial whether notice of the Knights' insolvency, or failing condition, be brought home to the complainants personally, if their agent or attorney had notice ; for, upon general principles of policy, it must be taken for granted that the principal knows whatever the agent knows. Per Ashurst, J., in *Fitzherbert v. Mather*, 1 T. R. 16 ; Paley on Agency, 199. If such were not the law, notice might be avoided in every case by the employment of an agent. Amb. 626. And this principle applies equally in law and in equity.—Paley on Agency, 199 ; *Doc ex d. Willis v. Martin*, 4 T. R. 66.

Having ascertained that on the 9th February, 1852, when this mortgage was made, the mortgagors were insolvent, and the mortgagees took it under such circumstances as to charge them with notice of that fact, we proceed to inquire whether the deed can be supported.

Upon this point, the bare statement of the proposition is at once the solution of it. An insolvent firm, with a large amount of debts in suit against it, which in a short time will go into judgments, is importuned by one of its creditors for security. This firm consents to give the security, by a mortgage on all the effects of the partners, as well as firm effects, upon condition that the grantors, or mortgagors, shall retain the possession of the property for *six* years. This property is more than sufficient to pay the mortgage demand ; and the mortgage embraces, in addition to other property, live stock, provisions, &c., which must, in the contemplation of the parties, have been intended to be used by the mortgagor and his family, who have no other means of support, and a part of which must be consumed in the use. But it does not stop here:—the mortgage is made to cover all the corn and cotton which may be raised by the mortgagors until the law day, or payment of the mortgage debt ; by which provision, we suppose, was intended the surplus after supporting the



family of the mortgagors. Such, evidently, is Mr. Reese's understanding of the agreement; for, in his deposition, he states, that he called on the mortgagors for the proceeds of the crop; and that Knight informed him (as he believes, truly) that by reason of his having to pay high for *provisions* and rent of land, no *surplus* remained. It must be borne in mind, also, that the debts thus secured were all past due when this mortgage was executed.

What is the necessary effect of such a deed? We answer, If the contract is allowed to stand, and is to be carried out, the insolvent debtor, in consideration of a preference given to one among many creditors, has purchased a living for himself and family for six years, at the expense of all but the preferred creditor; he will have hindered and postponed the collection of all the demands against him for that length of time, enjoying all the while the possession of all his estate. As was said in *Montgomery v. Kirksey*, 26 Ala. R. 185, "It is not permissible for any one thus to avail himself of a part of his indebtedness, to tie up all his property and exempt it from liability to satisfy his other debts, while he has the temporary benefit of the use of it," &c. The preferred creditor and the insolvent debtor agree to appropriate the *whole* of the debtor's property, which is more than sufficient to pay the preferred debt, to their mutual and exclusive benefit for six years, to the hindrance, delay, and utter exclusion of all other creditors; and, not content to limit this exclusion to the property itself, they embrace, under cover of their deed, the issues and profits thereof.

It will not do for the preferred creditor to say, 'I was influenced by no fraudulent or improper motive—all I desired was to secure an honest debt, and I made the very best arrangement with my debtor the most urgent entreaty could obtain.' At this point the law interposes, and says, 'Every man is presumed to intend the natural and necessary consequences of his acts; and the courts must presume the intention to exist when the consequences must necessarily follow, and will not listen to an argument against it.'—*Pope v. Wilson*, 7 Ala. R. 694. The law allows an honest preference to be given by a failing debtor to a creditor; but it utterly repudiates the idea, that such a preference may be obtained by

tying up all the debtor's property, which is more than sufficient to secure the debt, exempting it for an unreasonable time from all his other creditors, while it is provided (or results as matter of law in the absence of a provision) that the insolvent, in the meantime, shall reap a permanent benefit from it, by retaining the possession. In such case, the arrangement is, as a conclusion of law, fraudulent and void, as it operates a fraud on the other creditors; and whether the parties actually intended to defraud or not, is wholly an immaterial inquiry.

None of the numerous cases cited by the counsel for appellants are analogous to the case before us. The cases which hold that it is competent for the court of equity to control the action of a mortgagee, whose mortgage becomes oppressive to a third party, apply to mortgages fairly made, and not to those which operate in the nature of assignments by insolvents of all their property.

The cases relied upon by the learned chancellor, especially, *The Farmers' Bank v. Douglass*, 11 Smedes & Mar. R. 469, sustain the view he felt constrained to take of this case; which view, upon a full investigation of the record, we think is in perfect consonance with the law.

That the complainants have discharged the mortgage debt to Wimberley, as a prerequisite to obtaining the mortgage under consideration, gives them no right upon the allegations of this bill, to insist upon that mortgage which has been satisfied. They paid it as part of a contract by which they were to become the creditors of the mortgagors, the Knights, to the extent of such payment; the same to be extended to the first day of January, 1858, being blended with the previous indebtedness of the Knights to the complainants. As between the complainants and the Knights, this deed, and the arrangement on which it is based, are valid. The deed is only void as to the creditors whose debts are delayed, hindered, &c.—6 Ala. R. 367; 5 *ib.* 31; 10 *ib.* 804; 24 *ib.* 513; *ib.* 531. Neither party to it can say it is void for fraud. The reply of the Knights to such an allegation might be, 'It is only void, by the statute, as to creditors defrauded—as between us, the parties to it, it is valid.' Besides this, there is no averment that the Wimberley mortgage was assigned

to complainants, or that it is subsisting. The bill is not filed to set it up, but virtually concedes that it is discharged, and claims the sum paid as secured by complainants' mortgage.

But it may be said, that the court may hold the mortgage to the complainants as a valid security to the extent of the amount paid to extinguish the Wimberley mortgage—that a deed may be good in part, and bad in part, as was decided in *Anderson v. Hooks*, 9 Ala. R. 704. Without disputing the authority of that case, we think it has no application to the one before us. There, the deed secured separate demands alleged to be due to different individuals. One was simulated, the other *bona fide*; and it was held to be a valid security for the honest debt, but void as to the simulated one. The honest creditor, who did not in any way participate in the fraud of the grantor, and who accepted a provision fair and *bona fide* on its face, was not held affected by the fraud of the grantor by inserting and professing to secure a simulated demand. In this case, there is no party to the deed unaffected by its infirmity. This infirmity goes to the instrument as a whole, and equally affects all its parts. If it avails at all, it must avail according to its terms. If it be held as security for *part* of the demand, because *that* was the price of extinguishing an incumbrance which constituted a lien older than that of the creditors, it must operate according to its terms, or else we must make a new contract of security for the parties; and if it is so to operate, why then the deed effectually delays, hinders, and defrauds the creditors, to the extent of this payment.

But it is argued, that the creditors set up this agreement to extinguish Wimberley's mortgage, and, having gotten rid of that, seek to invalidate the mortgage which, to that extent, they have made available for their benefit. The answer to this is, that the creditors do not set up either deed. They merely repose upon their legal rights. It is the complainants, as we have said, who set up the deed, and who ask the court to become active in relieving them against the creditors—to decree an injunction, in virtue of a deed which is fraudulent as to those creditors; and if this cannot be done, then, under the general prayer for relief, to rid them of the dilemma in which they have placed themselves, by refunding

the amount they were compelled to pay in order to obtain such deed. We have seen no case which goes to this extent.

To proceed and render a decree, setting up the Wimberley mortgage, and pronouncing that void which is set up in the bill, would be to render a decree, which would not only be unsupported by the allegations of the bill, but predicated upon a state of facts precisely the opposite of those which are charged; for it would be to declare null and void a deed which the complainants set up as valid and effectual, and on which they ground their title for relief, and to set up a deed as subsisting which the complainants allege has been fully paid and discharged. So that, without intending to decide whether the complainants can have any relief on account of their payment of the mortgage to Wimberley upon a proper application, it is clear they can obtain no relief under the case as now presented.—1 Danl. Ch. Pr. 437; Litt. Sel. Cases, 146; 16 Peters, 182; 13 Ala. R. 693; 22 *ib.* 106; 2 Dev. R. 44; 2 Paige, 396; 4 *ib.* 538. To set up the Wimberley mortgage, would be to take the defendant entirely by surprise, as it is only mentioned for the purpose of corroborating the plaintiff's right to the relief specifically prayed. 1 Danl. Ch. Pr. 437; 2 Paige, 397.

Upon the whole, while we feel satisfied that the agent of the complainants, who procured this mortgage, was influenced solely by an honest desire to secure the demands of his principals, which were in danger of being lost, he has suffered his zeal to obtain for them a preference, and the obstinacy of the grantors which refused peremptorily any terms but those contained in the deed, to betray him into an arrangement, which, however free from any fraudulent intention on his part, operates necessarily a fraud on the other creditors; and as the circumstances are such as reasonably to bring home notice to him, and consequently to his principals, of the nature and operation of such deed, the law affixes the intent as contemplating the necessary result, and stamps the deed as fraudulent and void.

Let the decree be affirmed.



LIGHTFOOT ET AL. *vs.* LIGHTFOOT'S EXECUTOR.

[MARSHALLING OF ASSETS BETWEEN HEIR AND LEGATEE, ON BILL FILED BY EXECUTOR FOR SETTLEMENT OF ESTATE IN EQUITY.]

1. *English doctrine.*—In England, though the personal estate is the primary fund for the payment of debts, yet the testator himself, by express direction or plain implication, might devote his realty to that object instead of his personalty; and whenever debts are thus chargeable on land, while the personalty is given either pecuniarily or specifically, courts of equity, acting on the presumed intention of the testator, will so marshall the assets as to exonerate the personalty and throw the debts on the realty.
2. *Descended lands liable for debts in case of what legacies.*—Descended lands are liable for the excess of debts, after the provision made by the testator is exhausted, before general pecuniary legacies, or other specific legacies; and a gift of all the property of a specified kind which the testator possesses, when not given as a residuary bequest, is for this purpose considered specific.
3. *Under statutes of this State.*—In this State, although the personalty is the primary fund for the payment of debts, yet the real estate is also bound for them, irrespective of their character, to the same extent that recognizances and debts by specialty bound real assets in England; and hence, with us, descended lands are liable for the excess of debts, in exoneration of a legacy of “all the negroes not before bequeathed.”

APPEAL from the Chancery Court of Madison.

Heard before the Hon. E. D. TOWNES.

THIS bill was filed by John F. Wyche, as executor of the last will and testament of Clackston Lightfoot, deceased, against the heirs-at-law and legatees of said decedent; asking the direction of the court in the settlement and distribution of his estate. The bill alleges, that said testator died in October, 1846, having first made and published his last will and testament in writing, dated November 29, 1842, which was duly admitted to probate after his death, and which, after making several specific bequests and devises, and directing his executor to sell a certain tract of land, two negroes, crop of cotton and corn, and all stock not bequeathed, and pay his debts out of the proceeds of sale,—contained a bequest in these words: “All the negroes not before bequeathed, and what surplus of money may be left after paying my debts, I will, give, and bequeath to the children of my brother Harri-

son Lightfoot, to be equally divided among them, and given off to them as they attain the age of twenty-one years, or when they marry." It is further alleged, that said testator, after the execution of his said will, acquired another tract of land and several slaves, as to which he died intestate; that these have been sold by the executor, under an order of the Probate Court, for the purpose of distribution, and the proceeds of sale are now in his hands; that all the specific legacies have been paid and delivered, and refunding bonds taken from the legatees, but the slaves bequeathed to the children of Harrison Lightfoot are still in the executor's possession; that the fund appropriated by the testator to the payment of his debts has been exhausted, leaving debts to the amount of \$2,000 still unpaid, and to pay these resort must be had, under the direction of the court, either to said descended lands or to said legacy to the children of Harrison Lightfoot.

The heirs-at-law demurred to the bill for want of equity, but their demurrer was overruled. During the progress of the suit, an order of reference was made of the matters of account; and the register's report thereon shows, that of the debts for which the executor was allowed a credit, nearly \$3,000 was "for expenses, &c., incurred after the testator's death." The cause was submitted to the chancellor, on a motion for instructions to the master in stating the account for final settlement; and he thereon rendered a decree, holding that the legacy to the children of Harrison Lightfoot was general, and was therefore liable for the excess of debts before the descended lands could be resorted to. The account was stated in conformity with these instructions, and a final decree rendered accordingly; and from this decree the children of Harrison Lightfoot now appeal.

WM. RICHARDSON and LUKE PRYOR, for appellants:

I. The legacy to the children of Harrison Lightfoot is specific. It could be distinguished from the rest of the testator's estate at the time of his death.—Roper on Legacies, vol. 1, pp. 200, 203, 213, 217; White & Tudor's Leading Cases in Equity, vol. 2, pt. 1, pp. 397, 400, 221. Even the words 'remainder', 'residue', &c., though in terms residuary, are sometimes held specific.—Roper, vol. 1, pp. 240, 356. Specific

legacies only abate among themselves for the payment of debts, and are not resorted to until real estate descended is first exhausted.—White & Tudor's L. C., vol. 2, pt. 1, p. 405. Specific legacies are subject to ademption, while general legacies are not.—*Ib.* pp. 386, 405. That the doctrine of ademption is recognized in this State, see *Roberts v. Weatherford*, 10 Ala. 72. It is clear that this legacy could have been adeemed.

II. But, conceding this to be a general legacy, yet it will not be taken to pay debts until the general personal estate, or personal estate unbequeathed, real estate devised for the payment of debts, and real estate descended, have been first exhausted.—White & Tudor's L. C., vol. 2, pt. 1, pp. 392–3. After-acquired lands, in the hands of the heir, will be charged with the debts, which are *per se* chargeable on land, even when there is a general charge on the land by the will.—*Ib.* pp. 225–6. In this State, all lands are chargeable with the debts of the deceased; and there is no distinction between specialty and simple contract creditors. When there are two funds to which creditors have a right to resort, a legatee shall not be disappointed by their act. If there are legacies and debts by specialty, and the real estate descends, if the creditors exhaust the personal estate, the legatee may come against the real estate in the hands of the heir, and a court of equity will marshall the assets for that purpose.—White & Tudor's L. C., vol. 2, pt. 1, pp. 183–4, 187–90.

3. Independent of the character of the legacy—whether specific, general, or residuary—it cannot be resorted to for the payment of debts until the real estate descended or after-acquired lands are exhausted, for another reason. Numerous decisions of this court settle the rule, that the intention of the testator, if not contrary to some positive rule of law, shall govern the disposition of his property; and that, to ascertain this intention, all parts of the will must be looked to and construed together. The application of this rule to the present case, it is insisted, shows that the testator intended that this legacy should be exempt from the payment of debts; and this intention being ascertained, a court of equity will so marshall the assets as to effectuate it.—Williams on Executors, vol. 2, pp. 1009, 1212; White & Tudor's Leading Cases, vol. 2, pp.

215, 225; Farley v. Gilmer, 13 Ala. 141, and cases cited. The case cited from 4 Mass. 357, was decided under a special statute, and has no application here.

4. This legacy vested immediately upon the testator's death. At common law, a vested specific legacy, free of all conditions and contingencies, if not postponed by the will, was payable immediately upon the testator's death; while a general legacy was not payable until the expiration of one year. White & Tudor, pp. 393-5. Under the statutes of this State, although the legacy vests immediately, it is not demandable until after the expiration of eighteen months, in order that the administrator may appropriate it, if necessary, to the payment of debts; but when the legacy is not required for the payment of debts, the legatee's right relates back to the testator's death, and draws interest or hire.—Hallett & Walker v. Allen, 13 Ala. 554; Broadnax v. Sims, 8 *ib.* 497. The chancellor's decree is therefore erroneous, in subjecting the hire of the negroes bequeathed to the children of Harrison Lightfoot to the payment of debts, in exemption of the after-acquired lands. So far as this question is concerned, there is no distinction between debts created by the testator in his lifetime and debts created in the course of administration after his death.

ROBINSON & JONES, *contra* :

1. The court properly charged the debts in question on the legacy to the children of Harrison Lightfoot, because the will, in terms, does the same.

II. The personal estate is the primary fund for the payment of debts.—Kelsey v. Western, 2 Comst. 501; Hayes v. Jackson, 6 Mass. 149; Tate v. Hardy, 6 Cowen's R. 333; Livingston v. Newkirk, 3 Johns. Ch. 312; White & Tudor's Lead. Cases in Equity, vol. 2, pt. 1, p. 215; Clay's Digest, p. 191, § 1. This, as a general proposition, is not denied by the appellants; but they seek to avoid its application in this case, on the ground, first, that their legacy is specific. On the contrary, that their legacy is residuary, or, at least, general, is shown by the following considerations:—

*First*—A specific legacy is a bequest of a particular chattel, specifically described, and distinguished from all others of the



same kind.—Lovelass on Wills, 440; Ward on Legacies, 16; Childress v. Childress, 3 Ala. 753; White & Tudor, vol. 2, p. 382. *Second*—A specific legacy fails, if the property cease to exist in specie before the will goes into effect, whether it be destroyed or changed into other property.—Ward on Legacies, 16; Lovelass on Wills, 441. *Third*—In regard to personalty, a will takes effect at the testator's death, and, in the absence of words showing a contrary intention, must be construed as if made at that time.—Hardy v. Toney, 20 Ala. 238; Atwood's Heirs v. Beck, 21 *ib.* 590. *Fourth*—When rules of construction have to be resorted to, the court always inclines against construing a bequest to be specific.—White & Tudor's Leading Cases, vol. 2, pp. 382, 406. *Fifth*—Specific legacies do not contribute to pay debts, in case of deficiency of assets, until the residuary and general legacies are exhausted; but when this happens, specific legacies abate among themselves. Lovelass, *supra*, 441; White & Tudor, *supra*, 216, 405. The application of all these rules shows that this bequest is not specific.

At common law, a general legacy of personal property must be applied to the payment of debts before lands descended to the heir.—Livingston v. Newkirk, 3 Johns. Ch. 309; 2 Smith's Chancery Practice, 274; Hayes v. Jackson, 6 Mass. 149; White & Tudor's Leading Cases in Equity, vol. 2, p. 216, note; Jarman on Wills, vol. 2, p. 546. Some of the authorities, it is true, hold that lands descended are to be taken to pay debts before a general pecuniary legacy; but none of them assert that such lands are to be exhausted before general legacies of personal property.

The statutes of this State adopt a new and arbitrary rule for the appropriation of assets to the payment of debts, and make debts, in the absence of any adequate provision for them in the will, primarily chargeable on the personalty, whether bequeathed or not, and whether the lands descend or not. The act of 1806 provides, that "the goods and chattels, or personal estate, of any person deceased, whether testator or intestate, shall stand chargeable with the payment of all the just debts and funeral expenses of the deceased, and the charges of settling said estate"; and that "the lands, tenements, and hereditaments shall stand chargeable with all

the debts of the deceased, over and above what the personal estate shall be sufficient to pay as aforesaid.”—Clay’s Digest, p. 191, § 1. The act of 1822, authorizing an administrator to apply for the sale of lands to pay debts, requires him to state in his petition “that the personal estate is not sufficient for the payment of the just debts”, &c.—Clay’s Dig. p. 224, § 16.

Independent of the statute, lands are not assets at law; and the statute, above cited, only makes the lands liable to pay the debts of the deceased, and such, too, as are left unpaid by the personal estate: nothing is said about expenses, &c., as when speaking of personal estate. Descended lands, therefore, can only be appropriated to the payment of debts left by the deceased.—Drinkwater v. Drinkwater, 4 Mass. 357; Cannon v. Turner, 6 Har. & John. 65. The master’s report shows that the excess of indebtedness to be here provided for was made up of the expenses of administration and other debts contracted by the executor.

GOLDTHWAITE, J.—The will, after making certain specific bequests and devises, and making a special appropriation of real and personal property for the payment of debts, proceeds thus,—“All the negroes not before bequeathed, and what surplus of money may be left after the payment of my debts, I will, give, and bequeath to the children of my brother Harrison Lightfoot, to be equally divided among them, and given off to them when they attain the age of twenty-one years, or marry.” The will was made in 1842, and subsequently to its execution the testator acquired other lands. The specific fund appropriated to the payment of the debts is not sufficient; and the sole question is, whether the deficiency is to be supplied out of the slaves given to the children of Harrison Lightfoot, or upon the after-acquired land.

This question, then, is governed by the rules of law which obtain as to the marshalling of assets between the legatee and heir,—whether the debts of the estate shall be charged against the legacy to the children of Harrison Lightfoot, or against the real estate descended.

By the law of England, the personal estate is the primary fund for the payment of the debts; and the simple contract creditor, until the statute 3d and 4th Wm. IV, c. 104, could

not in any way have subjected the lands descended to the payment of his debt. The testator, however, by virtue of the right of control which he possesses over his own property, might, by express direction, or by plain implication, devote his real assets to the payment of his debts instead of his personal property ; and whenever this is done, courts give effect to the intention of the testator. To carry out these principles, courts of equity marshal the assets of estates, consistently with the claims and equities of parties interested in their administration ; and acting upon the presumption, whenever debts are chargeable on land, and the testator gives his personalty either pecuniarily or specifically, that it is a clear indication of his intention, unless the contrary appears from the will, that it is to be given to his legatee instead of being appropriated to these debts, for which another portion of his estate is bound, courts of equity will marshal the assets, so as to throw the debts on the fund out of which the testator intended they should be paid.

This is the whole doctrine of marshalling the assets as between the legatee and heir, and the decisions of the courts of equity in England fully sustain it. Thus, in 1679, in an anonymous case, reported in 2 Chan. Cases, 4, the real estate descended to the heir was made to pay the mortgage ; the chancellor said,—‘ Where the heir is indebted by mortgage made by his father, or by any other means as heir to his ancestor, the personal estate in the hands of the executor shall be employed to pay that debt in case of the heir ; but if there be not other assets to pay other creditors, or other end of testator on his legacies, the heir shall not turn this charge on the personal estate. In this case, here was sufficient to pay the debt, &c., and the legacy out of the personal estate, and when both can be satisfied, both shall be satisfied ; and the contrivance to make the personal estate liable to the legacy towards satisfaction of the mortgage looks like a fraud, and shall not prejudice the legatee, but she shall have recompense against or upon the mortgage, though originally not liable to her.’ To the same effect is *Culpepper v. Aston*, 2 Ch. Cas. 114 ; *Herne v. Meyrick*, 1 Pr. Wms. 201 ; *Hanby v. Roberts*, Amb. 127 ; *Aldrich v. Cooper*, 8 Ves. 396.

In the cases we have cited, the legacies were, it is true,

pecuniary legacies ; but they were general—that is, no specific fund or money was bequeathed ; and the same principle which applies to legacies of this character, also obtains where any portion or all the personal estate is given as a whole, and not as a residuary bequest. The giving in that way is then held as demonstrative of the intention of the testator to exempt the legacy from charges to which the general personal estate is primarily liable. Thus, in *Blount v. Hopkins*, 7 Sim. 43, where the testator gave to his wife M. all his household goods, plate, linen, china, pictures, farming stock, ready money, personal estate, and effects of every description which he should happen to die possessed of, except certain articles which he bequeathed to another person, and charged his debts on real estate devised to trustees : the personal estate was held to be exonerated from the payment of his debts. Bearing in mind, that the fact of making provision for the payment of debts out of the real estate does not, of itself, indicate any intention to discharge the personalty (2 Jarm. on Wills, 565, and cases there cited), the case referred to is strongly in point, as it shows that the personalty was exonerated on the ground that it was, in effect, a specific legacy. Here the gift amounts to a bequest of all the slaves the testator had at the time of his death, which he had not bequeathed to others. Viewed in this aspect, the two cases are identical in principle, and the rule which was applied in *Blount v. Hopkins*, *supra*, is too well settled upon authority, to be shaken.—*Jones v. Bruce*, 11 Sim. 221 ; *Greene v. Greene*, 4 Madd. 148 ; *Mitchell v. Mitchell*, 5 *ib.* 69 ; *Driver v. Ferrand*, 1 Russ. & M. 681 ; *Fontaine v. Tyler*, 9 Price, 37 ; *Bethune v. Kennedy*, 1 My. & Cr. 114 ; *Stephenson v. Dawson*, 3 Beav. 342 ; *Queen's College v. Sutton*, 12 Sim. 521 ; *Everett v. Lane*, 2 Ired. Eq. 548 ; 2 Jar. on Wills, 580–589. The cases, as we have already said, regard the gift of all the property which the testator possesses of a specified kind, when not given as a residuary bequest, as a specific legacy (*Bethune v. Kennedy*, *supra*) ; and as being such, it is indicative of his intention that the legatee shall receive it free from all debts which are chargeable on the land.

By the law of this State, although the personalty is, as in England, the primary fund for the payment of debts, yet the



real estate is bound for them ; and no matter what may be the character of the debt, it with us binds the lands to the same extent that recognizances and debts by specialty bound the real assets in England ; and consequently, the same rules which, in courts of equity there, regulated the charge of those debts upon the lands descended to the heir, apply here to all classes of debts ; and hence the result in the present case would be, to throw the debts upon the undevised real estate which they bound, in exoneration of the legacy to the children of Harrison Lightfoot.

It follows from what we have said, that the decree of the chancellor was erroneous, and the same must be reversed, and the cause remanded, to be proceeded with in conformity with this opinion ; the appellee paying the costs of this court.

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## HINES AND WIFE *vs.* TRANTHAM.

[TRESPASS TO TRY TITLES TO LAND.]

1. *Tenant in common may maintain separate action.*—Tenants in common of land may maintain separate actions of trespass to try titles for their respective interests.
2. *Reversal for erroneous affirmative charge.*—An affirmative charge, by which a recovery is erroneously denied to the plaintiff on one specified point, is good cause of reversal, although there may be defects in his proof on other material points ; it not appearing from the record that these defects cannot be supplied on another trial.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. B. W. HUNTINGTON.

This action was brought by the appellants, in December, 1851, to recover the possession of a certain tract of land in the county of Pickens, as well as damages by way of rent for its detention ; and the only plea was, not guilty.

On the trial, as the bill of exceptions shows, the plaintiffs proved, that George M. Trantham, died in possession of the

premises sued for ; that Mrs. Hines, one of the plaintiffs, was one of his children and heirs-at-law, and that Mrs. Julia Crimm, the wife of Warren W. Crimm, was another ; that Mrs. Crimm and her said husband both died before the commencement of this suit, leaving no children. They then read in evidence a transcript from the records of the Orphans' Court of Pickens, showing that said Crimm, in right of his wife, at the February term, 1844, moved said court for his distributive share of said Trantham's estate ; that the defendant in this suit, as guardian of the minor heirs, had notice of said motion, and consented that it should be granted ; that commissioners were appointed by the court, to divide said estate, and to allot to the petitioners their share ; that the commissioners made a division, by which they allotted the lands now sued for, with other property, to said Crimm and wife ; that the report of the commissioners was returned to the court, and was by it ordered to be recorded. They then proved, that the sheriff administered the oath to the commissioners who made said division ; also, that Mrs. Crimm had five brothers and sisters, of whom Mrs. Hines was one, who were her heirs. The defendant then offered in evidence, to show title in herself, a deed for the lands in controversy, made to her after said division and allotment, by said Crimm and wife ; but it was proved, that Mrs. Crimm, when the deed was made, was under twenty-one years of age.

"Upon this proof," the court charged the jury, in substance,

1. That if Mrs. Crimm, when she executed said deed conveying the lands to the defendant, was under the age of twenty-one years, it did not divest her title.

2. That the action of the commissioners was not sufficient to invest Mrs. Crimm with title to the real estate allotted to her, unless they were sworn before a justice of the peace, or some other officer having authority to administer an oath, and unless their division and allotment was certified by such justice or other magistrate.

3. That the sheriff was not authorized to administer the oath.

4. That if they found from the evidence, under these instructions, that the proceedings of the said commissioners were not such as to invest Mrs. Crimm with the legal title to the land, the plaintiffs could not recover as her heirs.

The plaintiffs excepted to each of these charges, except the first, and they now assign the same for error.

TURNER REAVIS, for the appellant.

STEPHEN F. HALE, *contra*.

RICE, J.—Tenants in common of land may maintain separate actions of trespass to try titles, for their interests. *Craig v. Taylor*, 6 B. Monroe, 457 ; *Baker v. The Heirs of Chastang*, 18 Ala. R. 417 ; *Childers v. Tankersley*, 23 *ib.* 781 ; *Adams on Ejectment*, 211.

Upon the facts shown in the bill of exceptions, Mrs. Hines was one of the heirs of her father, and also one of the heirs of her sister, Mrs. Crimm. In 1845, Mrs. Crimm died, without issue, and her husband died before this suit was commenced. Conceding, then, that the proceedings of the Orphans' Court of Pickens county, and of the commissioners appointed by it, are void, and did not invest Mrs. Crimm with title to any land ; yet, as one of the heirs of her father, she had such an interest in his land, as would, upon her death without issue, descend to Mrs. Hines, as one of her heirs, and entitle her husband and her to maintain trespass to try titles, to recover that interest. This plain legal proposition is denied by the fourth charge of the court below, as we understand that charge, and as the jury doubtless understood it. In this, the court below erred ; and for that error, there must be a reversal, although there may be defects in the plaintiff's proof on other material points—it not appearing that these defects cannot be supplied on another trial.—*Cotten v. Thompson*, 25 Ala. R. 671.

Judgment reversed, and cause remanded.

## STEVENSON vs. O'HARA.

[SUIT COMMENCED BY ORIGINAL ATTACHMENT IN CITY COURT OF MOBILE. AND  
JUDGMENT TAKEN BY DEFAULT.]

1. *Clerk of City Court has no power to issue original attachments.*—Although the City Court of Mobile is by statute vested with all the powers of the several Circuit Courts, except as to actions to try titles to land, yet there is no statute conferring authority on its clerk to issue original attachments, which, being a summary remedy in derogation of the common law, must be specially conferred by statute, or it does not exist; and therefore, where there is a judgment by default, in a suit commenced in that court by such original attachment issued by its clerk, the whole proceeding will be quashed on error.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE appellee commenced suit against the appellant by original attachment sued out before the clerk of the City Court, and judgment by default was taken at the return term of the writ. From this judgment the present appeal is taken, and it is here assigned for error, among other things, that the clerk had no authority to issue the attachment, and the judgment is therefore void. No briefs were submitted by counsel on this point.

GEORGE N. STEWART, for the appellant.

PERCY WALKER and R. H. SMITH, *contra*.

CHILTON, C. J.—The City Court of Mobile is vested with all the powers vested in the several Circuit Courts, except as to actions brought to try titles to land.—Acts of 1851-2, pp. 75, 76. It does not follow, however, that the clerk of that court shall be vested with all the extraordinary powers which have been committed by acts of the legislature to the clerks of the Circuit Courts. As to the issue of all ordinary process which pertains to the clerk of a court exercising, with one exception, general common-law jurisdiction, there can be no doubt that the clerk's power is complete and ample. But the power to issue an attachment as original



process is extraordinary in its character. It requires a special act to confer it. Such acts, providing for summary remedies upon civil demands, are in derogation of the common law. And the power therefore ought to be clearly conferred, and should not be deduced from vague surmises as to the intention of the legislature. It does not follow, because the City Court has full jurisdiction over the subject of *original* attachments, that the clerk of that court may issue *such* writs. They are not writs issuing from the court, or by the authority of the court; but the person who issues them is *pro hac vice* made a judicial officer, and the jurisdiction of the court over them never attaches until they are returned, or, at least, until they are placed in the hands of its executive officer to be levied. Hence, we conceive that the power exercised in granting original attachments does not grow out of the relation in which the clerk stands to the court, but exists, if at all, independent of that relation—that is, it is not derived from the court as a quasi-judicial function, exercised by one of its ministerial officers under the jurisdiction or authority of the court, but is vested in the individual by the particular statute conferring it, not as constituting a part of the court, but as designated by his office.

Such writs, as *original process*, were unknown to the common law, and no one has power to issue them unless thereunto specially authorized. The clerk of the City Court is not among those who are so authorized to issue *original* attachments. His act was, therefore, void; and the City Court had, consequently, no jurisdiction of the cause, the judgment being by default. Its judgment, predicated upon the attachment and levy, must therefore be reversed; and as the writ was a nullity, the cause will not be remanded, but the whole proceeding must be here quashed.

Judgment accordingly.

## DOE EX DEM. KENNEDY'S HEIRS vs. REYNOLDS.

[EJECTMENT—LANDLORD AND TENANT—RULES OF PRACTICE AND EVIDENCE.]

1. *Tenant incompetent witness for landlord.*—A tenant, who is in possession of the premises sued for, is not a competent witness for his landlord : if the verdict is against him, he would be liable for the mesne profits, and might also be turned out of possession ; and since the mesne profits may be worth more than the rent of the land, his interest is not balanced.
2. *Injury presumed from error.*—If an incompetent witness, to whom objection is duly made and reserved, is allowed to testify to material facts, injury will be presumed from the error, unless such presumption is repelled by the record ; and though some of the facts to which he deposes are proved by witnesses on the other side, yet this does not cure the error.
3. *Rules of practice and evidence prescribed by Code do not apply to suits pending when it took effect.*—The rules of practice and evidence prescribed by the Code, by force of the exception contained in section 12, do not apply to suits pending when it went into operation—to-wit, on the 17th January, 1853 ; and the provision of section 2211, which gives the defendant in real actions a right to demand an abstract of the plaintiff's title, is one of these rules.
4. *Parol evidence of judicial proceedings inadmissible.*—A witness cannot testify to the foreclosure and sale of mortgaged premises : the record of the suit is the proper evidence.
5. *Attornment of tenant does not destroy landlord's possession.*—Attornment to a stranger, by the tenant in possession, does not, of itself, destroy or affect the possession of his landlord.
6. *Recovery conclusive only as to term laid in demise.*—A recovery in ejectment is only for the unexpired portion of the term laid in the demise : after its expiration, plaintiff cannot have execution on his judgment ; and if he enter, with or without execution, he is a trespasser, and attornment does not make the party in possession his tenant.
7. *Does not stop statute of limitations.*—A recovery in ejectment, without an entry under it, does not stop the statute of limitations.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

EJECTMENT for a lot of land in the city of Mobile ; separate demises being laid from William R. Hallett, as executor of Joshua Kennedy, deceased, and from the children and heirs-at-law of said Kennedy. The defendant entered into the usual consent rule, pleaded not guilty, and made the statutory suggestion of adverse possession and valuable improvements.

The suit was commenced in July, 1852, and the trial was had in May, 1853.

"When the case was called for trial," as the bill of exceptions states, "the defendant proved that he had given the notice prescribed in section 2211 of the Code, and insisted on enforcing the rule there prescribed. The plaintiff insisted that said section, by reason of section 12 of the Code, was not applicable to this case; but the court decided, that said section applied to cases begun before the Code went into effect, and laid over the case, and ordered the abstract of title therein prescribed to be given. The plaintiff excepted to this ruling of the court, and under it gave the abstract of title; confining himself on the trial to the title embraced in the notice, and not offering any other.

"The plaintiff proved, at the trial, that Mary B. Horton, the party who had notice to defend, was in possession before and at the time the suit was brought, and still was (in possession), and produced her acknowledgment of tenancy from William R. Hallett, as executor of Joshua Kennedy, deceased;" a copy of which; dated June 4, 1850, and acknowledging a lease from the day of its date until November 1, is appended to the bill of exceptions as an exhibit. He then proved the death of said Joshua Kennedy, and the probate of his will, of which a copy was offered in evidence; and, further, "that the lessors of the plaintiff, as laid in the first demise, were the children of said Kennedy, and their husbands were as laid in said demise, and that William R. Hallett was his acting executor." He then offered in evidence a transcript of the proceedings had in another action of ejectment, in reference to the same lands now in controversy, commenced on the 31st October, 1837; from which appear these facts:

The plaintiff declared on two separate demises from Joshua Kennedy—one commencing on the first day of June, 1825, for the term of twenty years; and the other, for the term of twelve years, commencing on the first day of June, 1837. The notice was served on Reynolds, the defendant in the present action, as tenant in possession; and one Samuel W. Cochran appeared as his landlord, and defended the suit. The case was tried in April, 1843, and a recovery had by the plaintiff; but no notice was taken of the death of Kennedy,

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the plaintiff's lessor, which is proved to have happened in 1838. On this judgment a writ of *habere facias possessionem* was issued on the 4th June, 1850, on which the sheriff made the following return: "Rec'd, 4th June, 1850, and on the same day I gave possession of the within described premises to William R. Hallett, executor of the estate of Joshua Kennedy, deceased."

"Plaintiff then proved, by the sheriff, that on the 4th June, 1850, he went on the premises with the writ of possession, and read it to Mrs. Mary B. Horton, who was in possession, and told her, that it was his duty to put Mr. Hallett in possession, but he was instructed not to put her out, if she would execute to Mr. Hallett an acknowledgment that she was his tenant, and sign a lease; that she requested time to hear from Reynolds, who was then in New Orleans, saying that she was in as his tenant; that he told her he would wait a few days; that in three days he returned, taking with him said acknowledgment of lease above mentioned, and repeated the aforesaid expression about his duty; whereupon Mrs. Horton said that she had not heard from Reynolds, and signed the lease. Plaintiff proved the value of the rents, and rested.

"Plaintiff proved a grant by the United States, of the whole square in which the lot sued for is, to Joshua Kennedy, under what is called the 'Price Grant'; introduced certified and official maps, showing the premises in question to be within said grant; and deduced title in the lessors of plaintiff, by proof of said Kennedy's will, the names of his children, and the husbands of the married females, as above shown. Defendant proved that Joshua Kennedy died in 1838, before the trial of said previous ejectment suit; and then offered Mrs. Mary B. Horton, as a witness; to which plaintiff objected, on the ground of incompetency. She was then examined, by order of the court, on her *voir dire*, and testified, that she had been in possession of the premises in question, as tenant of the party let in to defend, for nine years, and had paid rent each year up to last November; that she was in, up to that time, under written leases, but had taken no written lease for this year, and had not been called on to pay rent, but was ready to pay it, when called on, to said Reynolds. The court ruled, that the test of competency was whether she



was now the tenant of Reynolds, that the above statement showed that she was not, and that she was competent, and suffered her to be examined; to which plaintiff excepted. She testified, that she was, and had been for nine years, Reynolds' tenant; that the sheriff came to her, with the writ of possession, and read it to her, and told her he must turn her out unless she would give Mr. Hallett a lease; that Reynolds, her landlord, was then in New Orleans, and she asked the sheriff to write to him and inquire about the matter, to which he consented; that he returned, in three days, with the lease, and she told him that she had not yet heard from Reynolds; that the sheriff replied, 'she must sign it, or he would be compelled to put her out', whereupon she signed the lease.

"Defendant then proposed to introduce one Stickney, who, being examined on his *voir dire*, said, that in 1836 he sold the property in question to Reynolds, for \$2,400 or \$3,000, and gave him a deed, with a warranty to the extent of \$1,000 only, to cover the value of the improvements; that he took a mortgage for the purchase money, which he foreclosed; that one DeCosta bought at the mortgage sale, and conveyed to Cochran, who defended the former ejectment; that he compromised his warranty with Cochran, after said recovery in the ejectment suit by Kennedy, and paid him \$400 or \$500, whereupon Cochran conveyed to him (Stickney) by quit-claim, and he by quit-claim to Reynolds in 1853, without any consideration, but reciting in the deed a consideration of one dollar. The court ruled him competent, and allowed him to testify; and plaintiff excepted. He gave evidence tending to prove said facts above stated by him on his *voir dire*, including the proceedings of foreclosure and sale, without the records being produced or accounted for; to which the plaintiff objected, and, his objection being overruled, excepted. After parol proof was allowed as to the mortgage and proceedings under it, and exceptions taken thereto, and in a subsequent part of the trial, defendant gave record proof of said matters.

"Defendant also gave evidence, by Stickney and another, tending to prove that Joshua Kennedy, about 1819, conveyed the whole square (of which the premises in question were part) to one Ware; that Ware conveyed it to Stickney, in

1820, in payment of a debt; that Stickney took and held possession up to 1836, when he sold to Reynolds, who built on it and has since had the possession. There was, however, contradictory proof as to these matters, and evidence tending to show that the deed to Ware was from one —, and not from Kennedy; that it was altogether different, and not adjacent land; that the premises in question were vacant (up) to 1836; and that Reynolds, since 1836, obtained title from Kennedy, through an intermediate vendor, for a valuable portion of the premises testified to and covered by said deed of 1819; and that Reynolds paid \$2,000 for the same.

“Whereupon, the court charged the jury as follows:

“1. The plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's.

“2. In actions of ejectment, if the proof established the relation of landlord and tenant between the plaintiff and defendant, this alone would entitle the plaintiff to recover, because it implies possession and a better right on the part of the plaintiff, and the defendant is not permitted to dispute his landlord's title.

“3. But, if the relationship of landlord and tenant is not established between the plaintiff and defendant, then the plaintiff, to recover, must show that, at the commencement of the action, he had title to the land in controversy, or a right to the possession of it, by showing an unbroken chain of documentary evidence, or actual prior possession in himself, with claim of title, or prior possession, with claim of title, with regular conveyances from the possessor down to himself; and failing to establish some such position, the plaintiff would not be entitled to recover.

“4. The question of the validity of the former judgment, in favor of Doe on the demise of Kennedy, becomes material, in connection with the writ of possession issued upon it and the lease accepted by the occupant at the time the sheriff undertook to dispossess her, as affecting the right of possession of the parties. And here it may be premised, that a judgment in ejectment, though ever so regularly obtained, does not affect the title to the ground in dispute, but only has the effect of giving to the plaintiff the right of possession; and with this right he may enter upon the ground, if he can do so

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peaceably, without a writ. But, in the case at bar, what would be the effect, if Kennedy, the real plaintiff, at the time of the rendition of the former judgment, was dead? Upon this branch of the case, I charge you, that if you believe from the evidence that the real plaintiff was dead at the time of the rendition of the judgment, then, though the judgment may not for that reason have been a nullity, yet there was no person to whom the right of possession, in consequence of the judgment, could legally attach, and the right was (as it were) suspended until Kennedy's proper representative, heir or devisee, was recognized by judicial proceeding as the party entitled to the possession; and in this view of the case, if Kennedy was dead at the time of the judgment, it not being now made to appear that any party was recognized by the court as entitled to the possession in lieu of, or as heir or devisee of, the deceased plaintiff, the judgment, and the writ of possession issued upon it, were totally ineffectual, and are mere waste paper, in respect to the right of possession; and under these circumstances, if the occupant (Mrs. Horton), at the time the sheriff undertook to dispossess her, was in possession under a prior lease from Reynolds, then, whether she accepted the lease from Hallett voluntarily, or (as it were) under compulsion to prevent the sheriff from turning her out, such act of hers would not have the effect, as against Reynolds, of making her a tenant of Hallett, unless Reynolds assented to such attornment, nor would the acceptance of such a lease have the effect of interrupting the possession of Reynolds, her prior landlord. But, if the real plaintiff was not dead at the time of the judgment, then the right of possession did thereupon attach; and if, at the time the sheriff undertook to dispossess the occupant, there was a party recognized by the court as entitled to the possession, then, if the occupant, voluntarily or (as it were) under compulsion to prevent the sheriff from turning her out of possession, accepted a lease from the party entitled to the possession, such lease would be valid, and the occupant would thereby become tenant of the latter, as against any former lessor, and it would have the effect of interrupting the possession of the former landlord.

" 5. If the defendant, and those under whom he holds, have had uninterrupted adverse possession for the space of twenty



years before the commencement of the action, that is an available defence, and the plaintiff is not entitled to recover.

"6. If the ground in controversy belonged to Kennedy, from whom the plaintiff claims to derive title, and he conveyed it to one under whom the defendant claims, and the defendant has shown a regular chain of title from such vendee down to himself, this would be a good defence, unless the title passed back to the party under whom plaintiff claims.

"7. If defendant was landlord of the occupant, prior to and at the time the sheriff undertook to dispossess her; and at that time, the occupant, without notice to the prior landlord, or without a waiver on his part of the relation of landlord, accepted a lease from Hallett,—this would not prevent the defendant from setting up an outstanding title, or a paramount title in himself.

"8. If you find that the plaintiff is entitled to recover, you will find according to the provisions of sections 2201 and 2202 of the Code.

"To each of these charges the plaintiff excepted, and asked the court to charge the jury as follows:—

"1. If the jury believe that the sheriff went to Mrs. Horton, on the 4th June, 1850, with the writ of possession given in evidence, and read its contents to her, and civilly told her 'it was his duty to eject her, but that he was instructed by Mr. Hallett not to put her out, if she would give him a lease and become his tenant', and she consented to do so, and signed the lease,—then she became his tenant, and cannot dispute his title, nor can the party who is let in to defend as her landlord, but the jury must find for the plaintiff.

"2. That the former judgment and writ of possession are good and valid, until reversed or set aside, and cannot be impeached in this action; nor can the defendant set up the death of the lessor of the plaintiff, nor the failure to sue out a writ of possession within a year and a day, as any defence in this suit.

"3. That defendant has shown no valid outstanding title, good against the plaintiff, if the jury believe that Mrs. Horton gave the lease under the circumstances mentioned in the first charge asked.

"4. That the former recovery puts an end to all presump-



tion of title in defendant by lapse of time, and that he must defend in this action on the strength of his title, if the jury believe that the Jonathan Reynolds who received notice in the first suit is the same person now defending as landlord.

"Each of these charges, as asked, the court refused to give, and to each refusal plaintiff excepted."

All the rulings of the court above stated, to which exceptions were reserved, are now assigned for error.

ROBERT H. SMITH, for the appellant :

1. It was error to permit Mrs. Horton to testify as a witness. If she was not our tenant, she was Reynolds' (Adams on Ejectment, 110) ; and as tenant in possession, served with notice, she was incompetent. On recovery by plaintiff, she would be liable to an action for mesne profits, and the judgment would be conclusive on her.—*Jackson v. Hill*, 8 Cowen, 290 ; *Baron v. Abeel*, 3 Johns. 475 ; *Chirac v. Reinicker*, 11 Wheat. 296. Her incompetency appeared before she was called, and she could not by her own oath remove it.

2. It was clearly erroneous to permit Stickney to testify as to matters of record, and the error was not cured by the subsequent introduction of the record : *non constat* that the record agreed with his account of it, and the court cannot say which controlled the jury.

3. As to the charges : The judgment, being merely for the land, and not for damages, was not void because of the death of plaintiff's lessor.—*Ex parte Swan*, 23 Ala. 192 ; *Baker v. Chastang's Heirs*, 18 *ib.* 417 ; *Mooberry v. Marye*, 2 Munf. 453 ; *Kinney v. Beverley*, 1 Hen. & Mun. 531. The rule is, in such cases, to execute it under the direction of the court, as to who is to be put in possession.—*Virginia cases supra*. The writ of possession was only voidable, by reason of not having been sued out within a year and a day.—*Jefferson v. Morton*, 2 Saund. 6, note ; *Erwin's Lessee v. Dundas*, 4 How. (U. S.) R. 58 ; *Hollingsworth v. Horn*, 4 Stew. & P. 249 ; 15 Ala. 230.

The term laid in the declaration is a mere fiction for the purpose of proceeding to judgment ; and when that is done, it has spent its whole force, and is no longer of any use. It will always be enlarged.—*Lessee of Maus v. Montgomery*,

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10 Serg. & R. 192; Adams on Ejectment, 226. It might and would have been extended *nunc pro tunc*.—Riddle v. Lessee of Findlay, 6 *ib.* 227. Besides, under our statute of amendments, (Clay's Digest, p. 321, § 50,) no process is void for want or defect of form. As plaintiff could have corrected the process, on objection taken to it, yielding to it without objection was good. She might have yielded to a mere demand, based on the judgment, without any process. The objection was a mere matter of form, which she was not bound to insist upon.—Davenport v. Bartlett & Waring, 9 Ala. 186.

The previous recovery put the party to defend on the strength of his own title, and repelled all presumption of title from time.—Williams & Washburn v. Mills, 6 Cowen, 751; Jackson v. Rightmyre, 16 Johns. 324; Jackson v. Walker, 7 Cowen, 642; Whitney v. Wright, 15 Wend. 179.

WM. G. JONES, with whom was WM. BOYLES, *contra*:

1. There was no error in requiring the plaintiff, on notice, to furnish an abstract of his title, as required by section 2211 of the Code. That provision is merely a rule of practice, or of evidence, and does not affect "the proceedings" in any action; and it is well settled, that the law of evidence existing at the time of trial governs as to the admissibility of evidence. Yarborough v. Moss, 9 Ala. 382–88. All the provisions of the Code in relation to evidence (such, for example, as sections 2299, 2302, 2313) apply to causes commenced before its adoption, as well as to those commenced since.—23 Ala. 668; 24 *ib.* 373.

But, even if this position is not correct, plaintiff was not injured by this ruling of the court. He could include, and doubtless did include in the abstract furnished, every title on which he could possibly rely; he did not pretend that he had any other title, and offered none other on the trial. How then was he injured?—1 Ala. 517, 582; 19 *ib.* 63; 20 *ib.* 65, 78; 21 *ib.* 38.

2. The ruling that Mrs. Horton was a competent witness, though the reason given for it may have been wrong, was correct. Either she had no interest in the case, or it was balanced. It is fair to presume that the rent was a full equivalent for the possession of the premises, and she had not

paid rent in advance. If the plaintiff recovered in this action, and turned her out of possession, she would not be bound to pay rent; for it is well settled, that the rent ceases, if the tenant is ousted by legal process at the suit of a stranger. Comyn on Landlord and Tenant, (Law Library, vol. 26,) 523, 543. But, if her interest was not balanced, it was an interest in the event of the suit, and not in the record as an instrument of evidence (1 Phil. Ev. 97); and consequently she was competent under (§ 2302) the Code.

Here, also, if there was error, the record shows that no injury resulted from it to the plaintiff; for Mrs. Horton testified to no fact which had not previously been proved by his own witness.

3. Stickney was manifestly disinterested, and competent to testify. If there was error in permitting him to testify to the foreclosure of his mortgage, the error was cured by the subsequent introduction of the record itself.—20 Ala. 78.

4. There was no error in any of the charges given by the court, nor in refusing those asked by the plaintiff.

*First*—A tenant cannot oust his landlord, nor affect his possession, by attorning to a stranger, or by accepting a lease from a stranger, except at the landlord's election, or by his consent.—2 Co. Litt. (Thomas), top p. 466. At the time Mrs. Horton took the lease from Hallett, she was in possession as the tenant of Reynolds, and under a lease from Reynolds, executed after the previous recovery in ejectment. A lease obtained, under such circumstances, from Hallett, was a fraud on her landlord.—Baskin v. Seechrist, 6 Barr's R. 154, 163; Byrne v. Beeson, 1 Doug. (Mich.) R. 179; Mason v. Bascom, 3 B. Mon. 273; Jackson v. Harper, 5 Wend. 249.

*Second*—Our statutes (Clay's Digest, p. 320) materially alter the common-law rules as to actions of ejectment. On the death of Joshua Kennedy, the plaintiff's lessor, the suit ought to have been revived in the name of his personal representatives and heirs, or devisees. The lessor of the plaintiff is regarded as the real party; and if he was dead at the rendition of judgment, the judgment is a nullity.—*Ex parte Swan*, 23 Ala. 192; *Jordan v. Abercrombie*, 15 *ib.* 580; *The State, ex rel. Nabors' Heirs*, 7 *ib.* 459. Even at common law, though the suit was not abated by the death of the plaintiff's

lessor, yet no writ of possession could issue on the judgment until it was revived.—Adams on Ejectment, 346–7.

*Third*—No writ of possession was issued until the expiration of seven years from the recovery. The writ cannot be sued out after the expiration of a year and a day, unless the judgment is revived.—Clay's Digest; 206; Adams on Ejectment, 346.

*Fourth*—The term laid in the former ejectment expired on June 1, 1845, five years before the writ of possession issued. The law is, that a writ of possession cannot be issued, or executed, after the expiration of the term laid in the demise; and although the courts, on application, will sometimes extend the term, yet no such application was made in this case; and for this reason, also, the writ was a nullity as against this defendant.—Adams on Ejectment, pp. 215, 225, 227–8, 339; Jackson v. Haviland, 13 Johns. 229; Smith v. Hornback, 4 Litt. 232; Coghill v. Burriss, 2 Dana, 57; Wood v. Coghill, 7 Mon. 601.

*Fifth*—The writ never was in fact executed, as is shown by the testimony of the sheriff. He must actually turn out the party in possession, and put the plaintiff in. Here he did no such thing: acting under the directions of plaintiff, or his attorney, he only used the void process to extort from a woman her signature to a release.

GOLDTHWAITE, J.—We regard the admission of Mrs. Horton as a witness for the defendant on the trial below as erroneous, for the reason, that by her own statement she was his tenant, (Ames v. Schuesler, 14 Ala. 600; S. C., 16 Ala. 73), and a tenant cannot be a competent witness for his landlord; for if the verdict is against him, he would be liable for the *mesne* profits, and might also be turned out of possession, (Doe v. Forster, Cowp. 621; Bourne v. Turner, Strange, 632; Jackson v. Hill, 8 Cowen, 290); and his interest is not balanced, for the *mesne* profits may be more than the rent of the land.—Adams on Ejectment; (1 Amer. ed.) 337, 338.

It is urged, however, that no injury resulted from admitting the evidence of this witness, for the reason, that the facts which her testimony conduced to prove were established by the plaintiff's witness. It is true that the testimony of the



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witness last referred to tended to prove that Mrs. Horton was the tenant of Reynolds at the time she accepted the lease from Hallett; but this was not the only fact proved by her when introduced by the defendant. She then testified that she had been his tenant for eight or nine years before her examination; and there was no testimony which conduced to prove this fact on the other side. The defendant relied on twenty years' possession; and the length of time he was proved to be in, by this witness, as his tenant, may have entered into the inquiry. The rule is, that injury must always be presumed from error, unless the contrary clearly appears. *Frierson v. Frierson*, 21 Ala. 549.

As to the right given by section 2211 of the Code, to the defendants in real actions, to demand an abstract of the plaintiff's title, we concede that it is nothing more than a rule of practice or evidence, and that it would apply to all such actions as were pending at the time the Code took effect, were it not for section 12, which provides that its provisions shall not affect any action commenced before its adoption. The words of the section referred to exclude the idea that the new rules of practice or evidence furnished by the Code are to be made an exception. It applies to all of its provisions; and the object undoubtedly was, to lay down a certain and definite rule for the direction of suitors and judges, in relation to the conduct of causes which had been commenced at the time the new law took effect, and to which for that reason some of its provisions might not be applicable. It was impossible to foresee what would be the result of commingling the two laws in the same case; and to avoid difficulties and embarrassments, which might arise from that cause, it was deemed better that all cases commenced under the old law should be governed by it from the time of their commencement to the final action of the court. Upon this class of cases the provisions of the Code have no more effect, than if it had never been adopted. As to them, the old law is, by the operation of the 12th section, kept alive.

From what we have said, it follows, that the court should not have required the abstract of title; but as the case must be reversed on other grounds, it is needless to inquire whether its action in this respect was, under the circumstances shown by the record, a reversible error.

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The court erred, also, in allowing the witness Stickney to testify to the foreclosure and sale of the mortgaged premises. The records of the suit were the proper evidence.

In relation to the legal questions presented upon the charges given and refused, it is to be observed, that an attornment by a tenant does not, of itself, operate to destroy the possession of the landlord.—2 Thomas' Coke, 466; Porter v. Hammond, 3 Greenl. 188; Wilson v. Watkins, 3 Pet. 48; Jackson v. Harsen, 7 Cowen, 323; Jackson v. Harper, 5 Wend. 246. It would follow, therefore, necessarily, that if Mrs. Horton, at the time she accepted the lease of Hallett, was the tenant of Reynolds, the latter could not be affected by that, unless there were other circumstances which made the attornment effectual. We agree, that as the effect of a recovery in ejectment is to give the right to the plaintiff to obtain possession for the remainder of the term which he has obtained judgment, the tenant may in such case protect himself against being turned out, by attorning to the party whom the law, as against his landlord, has declared entitled to the possession. But this depends upon the right which the plaintiff has to obtain possession by his judgment; and when that right ceases to exist, that which is dependent upon it also ceases.—Mason v. Bascom, 3 B. Mon. 269, 273.

We will not discuss the question whether the judgment upon which the writ of possession issued was void. Concede that it had been rendered in the lifetime of Kennedy, and in his favor, and that the attornment had been made to him at the same time, and under the same circumstances it was made to Hallett; it could not, in our opinion, have had any effect upon the landlord, Reynolds, for the reason, that the term of the demise, as declared upon in that action, had expired, and after that Kennedy would have had no right to issue execution; and if he had entered, either with or without one, he would have been a trespasser.—Jackson v. Haviland, 13 John. 229; Smith v. Hornback, 4 Litt. 232; Aslin v. Parkin, 2 Burr. 665. The recovery was simply for the unexpired term; and a plaintiff in detinue might just as well claim the right to have other property than that which he recovered delivered to him. This is, in effect, the reasoning of Lord Mansfield, in Aslin v. Parkin, *supra*; where, speaking of ejectment,

he says—"This judgment, like all others, only concludes the parties as to the subject-matter of it. Therefore, beyond the term laid in the demise, it *proves nothing at all*, because beyond that term, the plaintiff has alleged no title, nor could he be put to prove any."

Perhaps, if application had been made in time, the term might have been extended. We say nothing as to this, for it was not done; but we are clear that the judgment, as it stood, could have conferred no authority upon Kennedy, had he been living, or upon his heirs, or devisees, he being dead, to enter with or without execution; and that the acceptance of the lease by the tenant of Reynolds could not, under the circumstances, affect him, or make her the tenant to the party in whose favor it was.

The fact of a recovery in ejectment, without an entry under it, did not stop the statute of limitations.—*Smith v. Hornback, supra*; *Jackson v. Haviland, supra*.

The views we have expressed upon the points presented by the record, will be sufficient for a correct determination of the case upon another trial.

Judgment reversed, and cause remanded.

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## NASH & ROBINSON vs. SHRADER.

[ACTION UNDER CODE ON OPEN ACCOUNT FOR WORK DONE.]

1. *Bill of exceptions construed most strongly against appellant, and in favor of ruling of primary court.*—In an action on an open account for work done, defendant proved an agreement, made "in the spring of 1852", that goods to be furnished by him to plaintiff's sons, who were over twenty-one years of age, should be received in payment on plaintiff's account for the work then being done; and his accounts against the sons, "for goods furnished in 1852", were also produced and proved, but were not set out in the record. The court ruled out these accounts, and the defendant excepted: *Held*, that it would be presumed, on error, that some of the items in the accounts were for goods furnished to the sons before the making of the agreement proved, since this construction would support the ruling of the primary court.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought (under the Code) by Henry Shrader against the appellants, and was commenced by attachment. No pleas appear in the record. On the trial, as appears from the bill of exceptions, "the plaintiff offered evidence tending to show that, in 1852, he had made one hundred and fifty safes for the defendants, under a special contract to do the work for \$3 per safe. The evidence tended to show, on the part of the defendants, that they were merchants, and had a store at the place where said safes were being built, and had sold goods to the plaintiff; that the plaintiff had several sons at work with him, one of whom was a minor, and the others of age; that in the spring of 1852, after the plaintiff had entered upon the performance of said contract, he went to the defendants, and requested them to let his sons have goods, and agreed that the goods they might buy at defendants' said store should be received in payment upon the said contract for making said safes. The defendants produced, and proved, accounts against each of the plaintiff's sons, for goods sold them in 1852, amounting in the aggregate to more than \$200; that the articles in each of the sons' said accounts were charged to them respectively, and not to plaintiff. They offered evidence, also, tending to show that, in December, 1852, they attempted to make a settlement of the matters of account between them and plaintiff and his sons; that they were present, and in the presence of the parties to this suit, the said accounts were admitted by Shrader and his sons to be correct, and Shrader agreed that they might be allowed in the settlement; but the parties, differing about one or two items in plaintiff's account, departed without settling.

"The defendants asked the court to charge the jury, that if they believed from the evidence, that Shrader agreed with defendants, that if they would let his sons have goods, their accounts should be received in payment for the safes he was building; and that afterwards, when Shrader and his sons were present, and were attempting to settle with the defendants for the safes, they admitted the correctness of the accounts in evidence, and Shrader said he would accept them in the



settlement,—then the accounts against his sons would be a good payment on the account sued on; which charge the court refused to give, and the defendants excepted.”

MORGAN & MARTIN, for the appellants.

J. J. WOODWARD, *contra*.

RICE, J.—When a bill of exceptions fairly admits of two constructions, one of which will support the ruling of the primary court, while the other will not, this court will adopt the former. The bill of exceptions must be construed most strongly against the party excepting.

The bill of exceptions in this case shows, that the agreement, on which the defence was rested in the charge asked by the defendants, was made “in the spring of 1852.” That agreement was, that the goods which the plaintiff’s sons should buy at the store of the defendants should be received in payment upon the demand here sued on, the amount of which is some four hundred and fifty dollars. The defendants produced and proved accounts against each of the sons of the plaintiff, for goods sold them in 1852, amounting in the aggregate to more than two hundred dollars. The bill of exceptions does not profess to set out all the evidence; nor does it set forth the accounts against the sons of the plaintiff; nor does it negative the idea that some part of these accounts was for goods sold to the plaintiff *in the early part of 1852, and before the plaintiff made said agreement*, that the goods his sons should buy at defendants’ store should be received in payment upon the demand here sued on.

Upon this bill of exceptions, we must intend that the accounts against plaintiff’s sons, produced and proved in the court below, showed that some of the goods therein charged were sold to the plaintiff’s sons *before the plaintiff made said agreement*. This presumption is consistent with the record, and sustains the refusal of the court below to give the charge asked by the defendants.

If any of the goods were sold to the adult sons of the plaintiff *before he made said agreement*, then the agreement did not bind him to receive an account for such goods in payment on the demand here sued on; and if he was not bound by this

agreement to receive an account for such goods in payment on his said demand, nor to pay for them, then the mere fact that, after these goods had been sold to his sons, he "*said* he would accept" the accounts for them "in the settlement", could not create a legal liability against him to take them in payment, nor make them a payment on his demand.

If the charge had been given as asked, it would have made it the duty of the jury to allow, as payment on the plaintiff's demand, all the accounts against the plaintiff's sons, although these accounts may have been *in part* for goods sold early in 1852, and before the plaintiff made the agreement referred to in the charge asked by the defendants.

When a charge, as asked, needs to be qualified or explained, to prevent it from misleading the jury, there is no error in refusing it.—*Swallow v. The State*, 22 Ala. 20; *Foster v. Rodgers*, at the present term. So, any charge may be refused, which assumes a fact to be proved which is not, although the fact is in itself immaterial.—*Waters v. Spencer*, 22 Ala. 460.

There is no error, and the judgment is affirmed.

## CENTRAL PLANK-ROAD CO. *vs.* SAMMONS & DOTES.

[ANCILLARY ATTACHMENT AND GARNISHMENT.]

1. *Toll-gate keeper may be garnished.*—Process of garnishment lies against the keeper of a toll-gate belonging to an incorporated plank-road company, to subject the money in his hands as the property of the company.
2. *Garnishee must answer as to present indebtedness.*—Under the Code (§ 2517) a garnishee is required to answer as to his indebtedness, not only at the time of the service of the summons, but also at the time of making his answer, and whether he will not be indebted in future by a contract then existing; and judgment must be rendered (§ 2541) for the admitted indebtedness.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. ANDREW B. MOORE.

THE appellees brought an action against the appellant on certain promissory notes, and recovered judgment thereon.

Pending the suit, an ancillary attachment was sued out, and one John B. Hubbard was summoned as a garnishee; who answered, "that at the service of said writ of garnishment, he was toll-gate keeper of toll-gate No. 1, in the employ of said company, and as such he had received, and had then in his possession, the sum of \$74 35, after deducting all wages due to him; that at the time of making this answer, he is still in possession of said sum of money, and an additional sum of \$5 51 received by him for said company as toll-gate keeper since the date of said levy; that there is no contract existing between him and said company, by which he will be in future indebted to said company; and that he has not in his possession any real or personal property, or things in action, belonging to said company." On this answer the defendant in attachment moved the court to discharge the garnishee; "which motion, being considered of by the court, was overruled, and the defendant excepted"; and judgment was then rendered against the garnishee, for the amount of money admitted by his answer to be in his hands, after deducting his expenses. This judgment is now assigned for error.

ELMORE & YANCEY, for the appellant, insisted,—

1. That the keeper of a toll-gate occupies the position of a clerk in a store who has charge of the money drawer, or of the cashier of a bank. He has no right to use the money which he collects, not even to exchange it for different funds; and though the money is actually in his possession, yet it is deemed in law to be in the possession of his principal. A fund collected by such an agent is no foundation for an action at law by his principal, until there has been a failure to pay over on demand.—*Tapham v. Braddick*, 1 Taunt. 572. An attaching creditor cannot subject a fund in the hands of a garnishee, for which the defendant in attachment could not maintain an action at law.—*Cook v. Walthall*, 20 Ala. 334; *Roby v. Labuzan*, 21 *ib.* 60; *Walke v. McGehee*, 11 *ib.* 273; 7 Mass. 438.

2. The garnishment relates to the time of its service, so far as the lien is in question, and does not give a lien on effects which have since come to the garnishee's hands.—*Roby v. Labuzan*, *supra*; *Hazard v. Franklin*, 2 Ala. 349; *Clay's Digest*, 59, § 19; *Code*, § 2517.

CHILTON, C. J.—Without intending to decide that there may not be cases of simple bailment where the subject-matter would be beyond the reach of the process of garnishment, we are of opinion that this is not one of them. The garnishee in this case does not materially differ from any other agent who collects money for his principal. He has collected a certain amount for the company, which he has in his hands. For that sum the appellant could maintain an action; and conceding that, in order to maintain such suit, there must be a demand and refusal to pay, yet the reason of this rule,—which was to prevent agents, who acted in good faith, from being put to costs by suit before they were put in default—does not apply to cases of garnishment, since the creditor has no right to demand it except by summons, and the garnishee is protected against the cost. The statute says, the attachment may be executed “by summoning any person indebted to, or having in his possession, or under his control, property belonging to the defendant.” The garnishee in this case certainly comes under one or the other of the classes described in the statute. If he holds the funds as a mere depositary for the company, he holds its property or effects; if he does not, yet, having collected such funds, he is debtor to the company.

The court properly gave judgment for the amount due from the garnishee to the company at the time of answering. The Code (§ 2517) expressly requires the garnishee to answer what he was indebted at the time of making his answer, and whether he will not be indebted to the defendant in future by a contract then existing, &c.; and if he answer to an indebtedness, section 2541 provides for rendering judgment on the answer.

Judgment affirmed.



## KIRKSEY vs. FIKE.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF AWARD ON SETTLEMENT OF PARTNERSHIP ACCOUNTS.]

1. *Bill not sustainable under act of 1846 giving attachments in chancery.*—A bill cannot be sustained under the act of February 5, 1846, "providing for attachments in chancery", when there is no allegation of indebtedness to any specific amount, and no affidavit that any particular sum is due.
2. *But sustained to enforce specific performance of award.*—Bill filed by partner against his co-partner in a tannery: alleging arbitration and award of partnership transactions, and insolvency of defendant; and asking an injunction, attachment, account, discovery and general relief. By terms of award, as alleged, partnership accounts, leather and skins on hand, and use of vats, were to be equally divided between the parties: *Held*, that the bill might be sustained, independent of the defendant's insolvency, for the purpose of enforcing the specific performance of the award, since a court of law could not afford full redress.
3. *Jurisdiction of equity to enforce specific performance of awards.*—Although equity will not compel the specific performance of an award, when the damages resulting from the failure to perform are capable of being exactly measured, and complete redress afforded at law; yet it is not enough to bar the interference of equity, that the party may successfully maintain an action at law upon the award—he must be able to obtain by a verdict all that it was the object of the award to give him.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Isaac Kirksey against Harlan Fike, and alleged, substantially, the following facts:

In November, 1847, Kirksey and Fike entered into co-partnership in the tanning business, but did not commence their operations until the fall of 1848. By the terms of the partnership, which were reduced to writing, and which are alleged to have been destroyed by Fike, Kirksey was to put in a negro man to work against Fike; and they were to open the yard, sink the vats, erect all necessary buildings, and prepare with their joint labor all things necessary to carry on the work. It was further agreed, that each partner should have one-half of the profits of the concern; if hides were received to tan on shares, the part which fell to them was to be divided; and

when Kirksey furnished hides to the yard at his own expense, he was to have three-fourths of the proceeds of the leather at the termination of the partnership, which was to continue five years; and the tan-yard, with all its appurtenances and fixtures, was to become the sole property of Kirksey at the termination of the partnership.

The yard was opened, and the vats were sunk; and the business was managed solely by Fike, who also kept the books of the concern; but he kept them so badly that Kirksey could not understand them, nor gather any correct information from them. Kirksey furnished a large amount of hides, but kept no account of them, and he does not know whether the memorandum kept by Fike was correct; a large amount of hides were also received from other persons to be tanned on shares. Fike went into the business without means, and all the hides which he purchased are charged to have been bought with the proceeds of the tan-yard. In November, 1851, Kirksey attempted to have a settlement with Fike of their partnership matters, but they were unable to agree; and thereupon they referred the settlement to three arbitrators, and each took an oath to abide by the award. The award was made in writing, but Kirksey has not the possession of it. According to his best recollection, and the information of one of the arbitrators, its terms were as follows: "That Fike should make a fair exhibit of everything in the tan-yard, up to June 1, 1851, and should divide all the leather in tan and all on hand which was tanned; that he should exhibit his books, and make a fair and equal division of the accounts due upon them; that Fike should have the liberty of using one half of the vats in the tan-yard until his contract should expire, and Kirksey should have the use of the other half."

Fike stated to the arbitrators, that there were on the books of the firm from \$1400 to \$1500 of good accounts, and the same amount in leather on hand, finished and in tan, up to said June 1, 1851; and Kirksey, although entitled to more than one-half of this sum, is willing to abide by the award. Fike further stated to said arbitrators, that he had worked in on one side of the yard, after June 1, 1851, a large amount of hides purchased with his own means, with others which he had taken to tan on shares, and that none of the leather or

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hides on that side of the yard belonged to said firm; but Kirksey charges that these statements were false, and intended to deceive the arbitrators, and that all these hides, except a few taken on shares to tan for other persons, were purchased with the means of the firm, which Fike was attempting to convert to his own use.

After said award was made, Kirksey sent his agent to Fike, to receive his half of the leather and accounts awarded to him; and Fike delivered to said agent one-half of the leather on one side of the yard, not exceeding in value \$400, and \$43 in accounts, of which the greater part is entirely worthless. Kirksey has notes on Fike, for money and provisions furnished him, on which Fike has made some payments; and this is all that Kirksey has received from the firm. Fike has been and is disposing of all the leather in the yard, with the view of defrauding Kirksey. He now has on hand 150 pieces of leather, worth \$300, and three vats of leather, each worth \$60; which have been procured by him from the profits of the joint business, and which are liable in equity to satisfy Kirksey's said demand on the partnership. Fike claims this leather as his own, is using and disposing of it for his own use and benefit, and is preparing to remove it from the yard, so that Kirksey will be without any remedy or means of indemnification. Fike is insolvent, and has no means out of which the money due Kirksey on a settlement of the partnership business can be made, unless the leather in his hands can be subjected; and he is fraudulently disposing of said property, with the view of defeating the collection of said demands.

The bill prays for an injunction, attachment, discovery and production of books and accounts, account of partnership transactions, and for general relief.

The chancellor sustained a demurrer to the bill for want of equity, and his decree is now assigned for error.

JOHN T. MORGAN, for the appellant.

WHITE & PARSONS, *contra*.

GOLDTHWAITE, J.—The bill cannot be sustained under the act of 5th February, 1846, (Acts 1845–6, 17,) as there is no indebtedness to any specific amount charged, nor any affi-

davit that any particular sum is due.—*McGown v. Sprague*, 23 Ala. 524.

We think, however, it can be sustained for the purpose of specifically enforcing the award. It is true, that if the damages resulting from the failure of Fike to perform were capable of being exactly measured, and complete redress could be afforded at law, equity would not interfere.—*Story's Equity*, (3 ed.) §§ 717a, 718; *Savary v. Spence*, 13 Ala. 561. In the present case the bill charges the insolvency of Fike; and we are by no means certain that, under the special circumstances of this case, that fact would not give the complainant the right to call upon a court of equity to enforce the award specifically.—*Deloret v. Rothschild*, 1 Sim. & Stu. 590. But, waiving the discussion of this question, we are of opinion, that the jurisdiction of the court can be sustained upon the award itself. To bar the interference of equity, it is not enough that the party might successfully maintain an action at law upon the award. The question is, could he by a verdict obtain all that it was the object of the award to give him? If he could not, then it would seem indispensable to justice that he should obtain it by a specific performance. In contracts for the sale of stocks, or goods, the reason why equity will not, in general, enforce them specifically, is, that the goods and stocks have usually a certain marketable value, and the purchaser can, on the breach of the contract, supply himself; and the money he would expend in the purchase of the quantity contracted for, with interest, would be given in the way of damages at law.—*Story's Eq.*, § 717. But where there are special circumstances, operating as an inducement to the contract, which a court of law could not look at in giving damages, the case would be different. Thus, where a ship-carpenter purchased a large quantity of timber near his yard, for the purpose of carrying on his business; as the market value of such timber, differently situated with respect to his yard, would not fully compensate him, it would be a proper case for specific performance.—*Buxton v. Lister*, 3 Atk. 384, 385; *Adderley v. Dixon*, 1 Sim. & Stu. 607. So, here, the complainant was engaged in the business of tanning; he was to receive one-half of the skins in the yard, as well as of the leather, and was also to have the use of one-half of the vats.



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It is fair to presume, that the award had relation to his business—that it contemplated his tanning the skins and selling the leather; and although a court of law might give him their value, and allow him for the use of the vats, it could not look to the profits he might have derived from them in the business, or the losses he might sustain from the failure of the other party to perform *in specie*; and thus he could not, in a court of law, obtain full compensation.

Decree reversed, and cause remanded.

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### EX PARTE KING.

[APPLICATION FOR MANDAMUS TO CHANCELLOR.]

1. *Jurisdiction of chancellor, pending appeal from final decree granting divorce a vinculo, to allow temporary alimony.*—On bill filed by the wife, asking a divorce *a vinculo*, an interlocutory order was made for the allowance of temporary alimony, and on final hearing a decree was rendered in her favor; a reference to the master was also made, to ascertain and report the value of the defendant's estate, and it was further ordered that the cause "be retained in court for further orders"; and from this decree, before the report came in, the defendant took an appeal: *Held*, that the chancellor, notwithstanding the suing out and pendency of the appeal, had jurisdiction to grant an order, on the petition of the wife showing a necessity for it, to secure the prompt payment of the quarterly allowances made by the previous interlocutory decree, and to require the defendant to pay the complainant's solicitors such further sum as might be a reasonable compensation for their services in defending the appeal.
2. *Mandamus lies, in favor of wife, on chancellor's refusal to allow temporary alimony pending suit for divorce.*—The wife has a right to a support out of her husband's estate, pending a suit for divorce against him, and also to such sum as is necessary to procure solicitors to conduct the suit for her; and when this right is denied by the chancellor at any time before permanent alimony is finally set apart to her, a *mandamus* will be awarded from the Supreme Court, to compel him to make the necessary order, as there is no other adequate and specific remedy.

APPLICATION for *mandamus* to the Hon. Chancellor JAMES B. CLARK, presiding in the Chancery Court of Macon. The

facts, on which the application is based, are stated at length in the opinion of the court.

JAS. E. BELSER and GEO. W. GUNN, for petitioner.

CLOPTON & LIGON, *contra*.

RICE, J.—In February, 1854, Mrs. King filed her bill in the Chancery Court of the 13th District of the Middle Chancery Division, against her husband, for a divorce *a vinculo*, and for an allowance out of his estate, upon the ground that he had committed actual violence on her person, attended with danger to her life, or health, &c.; and the defendant immediately filed his answer to the bill. At the May term, 1854, of said court, on the petition of the complainant, an order was made by Chancellor Clark, “that the defendant pay to the complainant, for her support and maintenance, until otherwise ordered by this court, the sum of five hundred dollars per annum, to be paid in quarterly payments; the first payment to be made on the 15th day of May, 1854, and so on, a payment every three months”, &c. “And that the defendant, without delay, pay into the hands of the solicitors of the complainant the sum of three hundred dollars, two hundred dollars of which they will retain for their services, and one hundred dollars of which they will apply to the defraying the necessary expenses of the preparation of this cause for hearing on behalf of the complainant,” &c.

At the Winter term, 1854, of said court, the cause was submitted for a final decree, upon the bill, answer and proof, to Chancellor Walker, who pronounced and filed a final decree granting to complainant a divorce *a vinculo*, and an allowance out of the estate of the defendant, and ordering a reference to the register to ascertain and report the value of the estate of the defendant, &c. One part of this decree is in these words,—“It is ordered that this case be retained in court for further orders.”

Before any report was made, the defendant, in February, 1855, took an appeal from said decree of Chancellor Walker to this court, and said appeal is still pending.

At the May term, 1855, of said Chancery Court, the complainant presented to Chancellor Clark her petition, stating

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and referring to all the proceedings of said court in said cause, the pendency of said appeal, the failure of the defendant to pay any of said quarterly allowances or payments except the first and second, and the necessity for the payment of all of them, as well as the necessity for continuing the allowance and payments until permanent alimony shall be set apart to complainant by decree upon the report of the register, and the necessity for a further allowance to complainant's solicitors for services already rendered and to be rendered in defending said appeal. The petition prayed for such order as would secure the prompt payment of said quarterly allowances until permanent alimony was set apart to complainant by decree on the report of the register, and for an order that defendant pay to her solicitors seven hundred dollars, in part for their services already rendered in the cause, and in part to enable her to defend said appeal, with the additional sum of one hundred dollars for extra expenses, &c., in the prosecution of said cause. Chancellor Clark denied the application made by this petition, and his order denying this application was entered on the records of said Chancery Court at its May term, 1855.

An application is now made by complainant to this court for a *mandamus*, to compel Chancellor Clark to make such order as was prayed for by said last-named petition; and notice of this application has been duly served on him, and on the solicitors of the defendant.

There is nothing in the decree of Chancellor Walker, which ousted said Chancery Court of its jurisdiction to grant an order to secure the prompt payment of the quarterly allowances until the appeal taken by the defendant shall be determined, and until the final action shall be had upon the report of the register and the litigation in the cause shall be completely closed. The jurisdiction of that court in the case is as full now as it ever was, except as to the grant of a divorce *a vinculo* and the allowance out of the defendant's estate, as permanent alimony, expressly decreed by Chancellor Walker. Its jurisdiction as to all such orders, as are prayed for by the petition of complainant, was as complete when that petition was presented as it was before Chancellor Walker made his decree.—*Lynde v. Lynde*, 4 Sandf. Ch. R.

373 ; Williams v. Williams, 3 Barb. Ch. R. 628 ; Gerard v. Gerard, 3 Barb. Ch. R. 628 ; Logan v. Logan, 2 B. Monroe, 142 ; Denton v. Denton, 1 Johns. Ch. R. 364 ; Code, § 1970 ; 2 Story's Eq. § 1425, n. 2 ; Stones v. Cooke, 8 Sim. 321, note.

Chancellor Clark should have granted the order to secure the prompt payment to complainant of the quarterly allowances, as prayed for in her petition ; and he should have also made an order, requiring the defendant to pay to the solicitors of complainant such sum as may be ascertained to be a reasonable compensation for their services already rendered in the cause and not paid for, and for their services in defending the appeal which has been taken by the defendant. And as he has refused to do so, and has had notice of the present application, and as the nature of the case is peculiar, and the necessity for prompt action apparent, a peremptory *mandamus* must issue to him—the Chancellor of the Middle Division and presiding over the Chancery Court of the 13th Chancery District,—commanding him to vacate the order made by him at its May term, 1855, denying the application made by complainant's petition presented to him at that term, and to make such order thereon as we have hereinabove indicated to be the proper order on said petition.

The general rule, that a *mandamus* will not be allowed when the party has another remedy, must be understood to relate to a specific remedy, which will place the party in the same situation as he was before the act complained of,—a specific and adequate remedy.—Etheridge v. Hall, 7 Por. 47.

The wife has a right to a support during the litigation, and also to such sum as is necessary to procure solicitors to conduct her suit with her husband. When this right is denied by the chancellor, pending the litigation, and before permanent alimony is finally set apart to her, there is no adequate and specific remedy for her, except the writ of *mandamus*. There is an essential difference between a case of peculiar nature and pressing necessity, like this, and other cases to be found in our reports in which we have refused to allow a *mandamus*; such as *Ex parte Rowland*, 26 Ala. R. 133.

Let a *mandamus* issue, in conformity with our views hereinabove expressed. William King, the husband of the petitioner, must pay the costs of this application.



## FOSTER vs. GLAZENER.

[DEBT ON FOREIGN JUDGMENT ESTABLISHING LOST NOTE.]

1. *Statutory proceeding in Georgia to establish lost note, not proceeding in rem.*—The summary remedy given by statute in Georgia to establish a lost note (Prince's Digest, p. 420, § 6). being predicated on an *ex parte* affidavit, and without notice to the party to be affected thereby, cannot be assimilated to suits commenced by original attachment, or others analogous to proceedings *in rem*, since the court has custody of neither the person nor the thing.
2. *Law of nations as to assumption of extra-territorial jurisdiction.*—It is a well-settled principle of international law, that every attempt on the part of one nation or state, by its legislation, to grant jurisdiction to its courts over persons or property not within its territory, is regarded elsewhere as mere usurpation; and all judicial proceedings, in virtue of it, are held utterly void for every purpose.
3. *Courts of general jurisdiction, as to summary proceedings, held limited and special.*—Although every reasonable intendment is to be made in favor of the regularity of the proceedings of courts of general jurisdiction; yet this rule cannot be invoked in favor of their summary proceedings under special statutory powers in derogation of the common law, as to which they are placed upon the same footing with courts of limited and special jurisdiction, and must strictly pursue the statute.
4. *Common law presumed to exist in sister States.*—By the common law, a man was not bound by any judicial proceeding, to which he was neither a party nor a privy, and against which he had no opportunity to defend; and any foreign statute, or rule of court, contravening this principle, and authorizing the court to proceed without notice, or upon publication, must be affirmatively shown, or the proceeding will be held void for want of jurisdiction.
5. *Invalidity of Georgia judgment establishing lost note.*—A summary judgment rendered under the statute of Georgia giving the Superior Court "power and authority to establish copies of lost papers", &c., "under such rules and precautions as are or may be customary and according to law and equity", will be held void in the courts of this State for want of jurisdiction of the person, when the record does not show the statute authorizing the court to proceed without notice.
6. *Plea to jurisdiction of foreign court.*—Ordinarily, in debt on a foreign judgment, a plea, averring that the defendant was without the jurisdiction of the court and had no notice, should also allege that he did not, either in person or by attorney, appear to the action; but this rule only applies to cases in which the record shows that the court had jurisdiction of the person; and where this does not appear, the defendant may, under the general issue, show that the court had no jurisdiction.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN GILL SHORTER.

THIS was an action of debt, brought by Ira R. Foster against Sion B. Glazener. The declaration contained all the common counts, and a special count, alleging that, "on the 28th August, A. D. 1848, at a term of the Superior Court begun and held in and for the county of Forsyth, in the State of Georgia, one of the United States of America, in a cause therein pending, wherein Ira R. Foster was plaintiff, and Sion B. Glazener was defendant, for the purpose of establishing a lost note; by the consideration and judgment of said court, the following copy was established, in lieu of the said original note so lost :

‘One day after date, I promise to pay Ira R. Foster, or bearer, one hundred dollars, for value received this 24th December, 1844.

Sion B. Glazener;’

as by the record and proceedings thereof, in the said court remaining, appears. And plaintiff avers, that said judgment had the force and effect, in the said State of Georgia, of establishing said copy note in lieu of the original note, which was lost as aforesaid; which said judgment still remain, in said court in the State of Georgia, in full force, strength, and effect, not in anywise reversed, annulled, vacated, paid off, or satisfied; and said note still remains due and unpaid by said defendant to said plaintiff. Whereby an action hath accrued”, &c.

The defendant demurred to each count in the declaration, but his demurrer was overruled: and he then pleaded *nil debet*, failure of consideration, want of consideration, and the following special plea to the special count: "That before the commencement of said proceedings in the Superior Court of Forsyth county, in the State of Georgia, set forth in the first count of plaintiff's declaration, defendant was a resident and citizen of the State of Alabama, and has since continued to be, and is a resident citizen of the State of Alabama; and from a long time before the commencement of said proceedings, until this time, has not been a resident, or a citizen of the State of Georgia; and defendant had no notice of said proceedings in said Superior Court for Forsyth county in said State of Georgia." The plaintiff demurred, in short by consent, to this last plea, and moved the court to strike the others from the files, on the ground that neither of them could be pleaded as a defence to this action. The court overruled

the demurrer and the motions, and the defendant then demurred to each plea separately except the last; and his demurrer being overruled, he then joined issue on the first three pleas, and replied to the last, "that plaintiff, at the time of the rendition of said judgment, was a resident citizen of said county of Forsyth in the State of Georgia, and, being such resident citizen, was the owner and holder of said note, given to him while such by said defendant; and that while such citizen he lost the same, and afterwards (still being such citizen) he instituted said proceedings in the proper court of said county, and obtained said judgment; and this he is ready to verify," &c. The court sustained a demurrer to this replication, and the plaintiff then replied again, "that plaintiff was the owner of said note, he being then a resident citizen of the State of Georgia and county of Forsyth, and, being such, lost said note: and thereupon plaintiff instituted said proceedings, and obtained said judgment." To this replication, also, the court sustained a demurrer, and the plaintiff then took issue on said plea.

On the trial, the plaintiff offered in evidence certain statutes of the State of Georgia, which may be found in Prince's Digest, pp. 419-20, §§ 3, 4, 5, 6; of which the last section provides, among other things, that the Superior Courts of the State "shall have power and authority to establish copies of lost papers, deeds, or other writings, under such rules and precautions as are or may have been customary and according to law and equity." In connection with these statutes, the plaintiff offered in evidence a certified transcript of the proceedings of said Superior Court of Forsyth county, Georgia, on which his action was founded. This transcript contained, first, the affidavit of the plaintiff, subscribed before a justice of the peace; setting out a copy of the note, to the best of his recollection, and swearing to his possession and its subsequent loss. On this affidavit, the court made an order at its August term, 1847. "that a copy of this rule be published once a month, for three months, in a public gazette of this State, or be served personally on the said maker, three months before the next term of this court; and if no cause is shown to the contrary, said copy will be established in lieu of said original note." At the February term, 1848, the

cause was continued, on account of the failure to make the publication required by the previous order; and at the August term, 1848, the following order and entry was made:—"It appearing to the court that the order granted at the August term, 1847, of this court, has been duly published as therein directed, and no cause being shown in opposition to said motion; it is, therefore, ordered and adjudged, that said rule *nisi* be made absolute, and that said copy note be, and the same is hereby, established in lieu of the lost original; and it is further ordered, that the clerk furnish Ira R. Foster with a certified copy of the said established note, and of this rule, upon application and payment of costs."

The defendant objected to this transcript going in evidence, and the court sustained his objection; and to this plaintiff excepted. The plaintiff then offered it, in connection with said statutes, "simply for the purpose of establishing by his affidavit contained therein the loss of said note, for the purpose of laying a predicate for secondary evidence of its contents"; but the court again excluded it, on defendant's motion, and plaintiff excepted.

In consequence of these rulings of the court, the plaintiff was forced to take a nonsuit; which he now moves to set aside, and assigns for error all the rulings of the court below.

ALEX. & JOHN WHITE, for the appellant:

1. The action of the Georgia court, establishing the existence of the note, was a proceeding *in rem*, and as such binding upon the parties, whether they had notice or not;—provided the court had jurisdiction of the thing. The replications to the fourth plea show this fact.—Croudson v. Leonard, 4 Cranch, 434; Andrews v. Herriot, 4 Cowen, 520; Grant v. McLachlin, 4 Johns. 34; Holmes v. Remsen, 20 *ib.* 229. Our proceeding by attachment is a familiar example of this.

2. That the matters decided are binding on the parties, see Blad v. Bamfield, 3 Swanst. 604; 4 Cowen, 522, and cases there cited; and this being the case, the judgment was binding upon the defendant as to the establishment of the existence of the note.

3. The act leaves the manner in which the note shall be established, discretionary with the court; the only thing



necessary to give it jurisdiction of the case, is the proof of the loss of the note; and even the amount and character of the proof of this fact is left to the court. But the proof required in this case is the same usually admitted in our own courts, and indeed the only evidence which the nature of such cases usually admits of—viz., the affidavit of the holder. There was also other evidence of its loss.

4. The position, that plaintiff's affidavit of the loss of the note is evidence for no purpose in this court, cannot be sustained. It formed part of the transcript from the records of the Georgia court, which was properly certified, and therefore entitled to all the force and effect given by the act of Congress.

JOHN T. MORGAN, *contra*:

This action is not really founded on a lost note, but on a Georgia record, which purports to have established a copy of a lost note. The record was offered in evidence under all the counts, including the common counts; and the statutes of Georgia were offered in evidence to show the jurisdiction of the court to establish the copy of the lost note. The objections to the admissibility of the record are,—

1. The offer to introduce it was not accompanied with any proof *aliunde* of the existence or loss of the note, and it was not therefore the best evidence. The affidavit in the record is not evidence for any purpose in our courts.—Chandler v. Hudson, 8 Ala. 366.

2. The Georgia statute, read in evidence, does not make copies of lost papers, established under its rules and provisions, evidence of the existence and contents of those papers, even in the courts of Georgia. Those rules certainly have no extra-territorial operation; and unless the proceeding in Georgia is a judgment, within the meaning of the constitution and acts of Congress, there is no law to give it force and effect in Alabama. It is not such a judgment; but, even if it were, the record shows that it was not rendered on personal service.—Bigger v. Hutchings, 2 Stew. & P. 445.

3. The Georgia statute confers on the Superior Court the power to establish lost papers, under such "rules and precautions as are customary and according to law and equity";

but no law or custom of those courts is shown, authorizing an *ex parte* proceeding, without notice, and on no other proof than the affidavit of the actor. To make the evidence competent, it must be shown, as a part of the authority of the Georgia court to act in this summary way, that they proceeded according to some custom or practice of those courts, or according to some rule of law there. The proceeding being purely statutory, and not according to the course of the common law, no intendments are to be made in its favor; especially where the whole matter belongs to a foreign jurisdiction, and is not a matter of judicial knowledge.

CHILTON, C. J.—The proceedings in the State of Georgia, to supply evidence of the lost note, predicated, as they were, upon the *ex parte* affidavit of the appellant, and without notice to the appellee, cannot be assimilated to proceedings upon original attachments, where the lands or personal property of the defendant are seized, and are considered in custody of the law, in lieu of the person of the debtor; and, to that extent, are analogous to proceedings *in rem*. Here, the court had neither the person, nor the *rem*, in custody.

It is a well-settled principle of international law, that every attempt on the part of one nation or State, by its legislation, to grant jurisdiction to its courts over persons or property not within its territory, is regarded elsewhere as mere usurpation; and all judicial proceedings, in virtue of it, are held utterly void for every purpose. This proceeds upon the known maxim, "*Extra territorium jus dicenti impune non paretur.*"—Story on Conflict of Laws, 449, § 539; 2 Vattel, b. 2, ch. 8, § 84; 2 Phil. Ev. (Cow. & H.'s Notes,) 2d ed., p. 907, note 637, and cases there collected. In the case before us, it does not appear from the record that the court of Georgia obtained jurisdiction of either the person or property of Glazener.

But it may be said, that the Superior Court of Georgia is one of general jurisdiction, and every intendment is to be made in favor of the jurisdiction of such court, and of the regularity of its proceedings; that its proceedings are to be deemed valid, until its jurisdiction is disproved by the party resisting them. This proposition may be conceded, and yet the appellant can take no benefit from it, for the reason, that

although the court is one of general jurisdiction, its powers respecting the subject-matter of adjudication are special and limited; and in respect of such extraordinary jurisdiction, which is in derogation of the common law, and summary in its character, the court is placed upon the same footing with a court of special and limited jurisdiction.—*Thatcher v. Powell*, 6 Wheat. R. 119–127; *Phil. Ev. (C. & H. Notes)*, 2d ed., vol. 2, p. 906, note 637; *Cone v. Cotton*, 2 Blackf. R. 82. *Whyte, J.*, in *Earthman v. Jones*, 2 Yerg. 493, said,—“Where a statute prescribes a new proceeding, either unknown to the common law, or contrary thereto, the statute, so far at least as those parts of it essential to jurisdiction are concerned, must be not only proved, but *shown to have been strictly pursued*, or the proceeding will be a nullity.”—See 10 Wend. 75; 1 Mass. 103; 2 East. 221. Such, also, is the uniform doctrine of this court, as is shown by the numerous decisions upon summary remedies, in favor of banks, &c.

By the statute law of Georgia, the Superior Court has power and authority given it “to establish copies of lost papers, deeds, or other writings, under such rules and precautions as are or may have been customary and according to law and equity.” What were the rules and precautions which were customary, and which accorded with law and equity? We are not informed by this record. It is clear that no person ought to be bound by any judicial proceeding, to which he was neither a party nor privy, and against which he had no opportunity afforded him to defend. This would be against the course of the common law; and if any statute existed, contravening this provision, or any rule, authorizing the court to proceed in a matter so vitally affecting the interest of a party, without notice, or upon publication, the statute, or rule of court, should have been shown; otherwise we must presume the common law obtains, and hold the proceeding void for want of jurisdiction of the person. We cannot, from this record, ascertain what the local law was, which prescribed the mode of procedure; and hence are unable to see that the law has been pursued. Tested by the law which we must presume applied, the proceedings are void for want of notice. *Borden v. Fitch*, 15 Johns. R. 141; *Andrews v. Montgomery*, 19 *ib.* 162; *Bissell v. Briggs*, 9 Mass. R. 467; *Shunway v.*

Stillman, 4 Cow. R. 294-5; *ib.* 524. The pleadings in an action are governed by the *dignity* of the instrument on which it is founded. If it be a record, *conclusive* between the parties, it cannot be denied, except upon the plea of *nul tiel record*.—Mills v. Duryee, 7 Cran. 431. But we have seen that such is not the effect of this record. It is available for no purpose whatever.

It follows from what we have said, that the court below did not err in the several rulings excepted to. The defendant could show, under the general issue (*nil debet*), that the court had no jurisdiction to render the judgment or decree (Bissell v. Briggs, 9 Mass. R. 462; Stephens v. Gaylord, 11 *ib.* 266; 4 Cow. R. 324); and being allowed to go behind the record, he could plead any plea going to the consideration upon which it was predicated.

Ordinarily, a plea to a judgment of a sister State, averring that the defendant was without the jurisdiction of the court and had no notice, should go further, and state that he did not appear to the action; for, notwithstanding he may have resided out of the State where the judgment was rendered, and have had no legal notice, he may nevertheless, by himself, or counsel, have appeared to the action. We apprehend, however, that this applies to cases where the record shows that the court had jurisdiction of the person. Here, the contrary is shown, unless we can *presume* that publication of the object of the motion to supply the lost note is equivalent to service; which we cannot do, in the absence of proof showing such to be the law of Georgia.

It is unnecessary that we make a more specific application of the principles settled above to the rulings of the court. They were predicated upon the idea, that the record was mere waste paper; and so we regard it. We cannot, therefore, set aside the nonsuit.

Judgment affirmed.



SANDS & CO. *vs.* MATTHEWS, FINLEY & CO.

[ORIGINAL ATTACHMENT AND GARNISHMENT—CONTEST WITH TRANSFERREE.]

1. *Acceptance of bill of exchange must be in writing*.—Under the provisions of the Code (§§ 1532, 1535), no right can accrue to any one from a verbal promise to pay or accept a bill of exchange, unless the party to whom such promise is made negotiates the bill on the faith of it.
2. *Retention of bill by permission no acceptance*.—If the drawee, by permission of the payee's agent, retain the bill for examination from Saturday until the following Monday, no legal obligation is thereby created against him as acceptor during that time (Code, § 1536).
3. *Drawee, before acceptance, liable to garnishment*.—A bill of exchange, until accepted, does not operate as an assignment of the funds in the hands of the drawee, which may therefore be attached by process of garnishment. (Expressly overruling *Connoley v. Cheesborough*, 21 Ala. 166; though the decision, under the facts, might have been rested on its authority.)

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE appellants, on the 16th May, 1853, sued out an original attachment against the estate of Stone & Walworth, as non-residents, and summoned Alexander Auld by process of garnishment, as their debtor; and afterwards, on the 18th May, 1853, recovered a judgment against said Stone & Walworth, for \$1,215 18. The garnishee appeared, at the June term, 1853, and answered as follows: "That he was indebted to said Stone & Walworth, in the sum of \$796 02, and no more; that they drew two drafts on him, in favor of St. John, Powers & Co., one for \$386 68, at one day's sight, and the other for \$420 97, at thirty days' sight, which drafts were presented to him for acceptance on Saturday, May 14, 1853, by St. John, Powers & Co., who represented themselves to be agents of the parties in New Orleans claiming the money; that he took the drafts into his possession, and requested that he might retain them until Monday, the 16th May, and promised St. John, Powers & Co. that he would pay the draft for \$386 68 on Monday, and if he found on examination that the amount of the other draft was correct, he would on Monday accept it, payable in thirty days; that the drafts remained in his hands,

in the same situation, when this process of garnishment was served upon him on Monday. Further answering, garnishee says, that on the 10th May, 1853, said Stone & Walworth drew on him, in favor of the same parties, for the sum of \$600, which he refused to accept, and that draft was accordingly returned; that afterwards they drew the drafts above named, which amount to more than his indebtedness to them by \$11 63, being so drawn by mistake; and he attaches hereunto a copy of his letter to said Stone & Walworth at the time said draft for \$600 was drawn on him."

By consent of parties, as appears from an agreement of record, Matthews, Finley & Co. were substituted for St. John, Powers & Co., and were permitted to appear as claimants without filing an affidavit; and it was further agreed, that said drafts were drawn in the ordinary form of negotiable bills of exchange, and did not indicate that they were drawn on any specific fund. In the judgment entry, discharging the garnishee, it is recited "that the said drafts were produced to the court, duly endorsed by said St. John, Powers & Co., by which it is shown that said Matthews, Finley & Co. are the rightful claimants of the fund mentioned in said garnishee's answer"; and the garnishee was accordingly discharged, at plaintiffs' costs, which judgment is now assigned for error.

PERCY WALKER, for appellants, made these points:—

1. The drawee of a bill of exchange cannot be held liable, under the Code, unless he accepts, or promises to accept, in writing.—Code, § 1532; 2 Story's Equity, § 1043.

2. The drawing of a bill, before acceptance, does not operate as an assignment to the payee of the funds in the hands of the drawee. The ruling in *Connoley v. Cheesborough*, 21 Ala. 166, it is submitted, is not correct, and is not sustained by the authorities cited in its support. The question has, of late years, undergone careful and elaborate discussion in the Court of Appeals of New York; and it is there held, that the drawee, until after the bill is accepted, owes no duty to the holder.—*Harris v. Clark*, 3 Comstock's R. 118; *Cowperthwaite v. Sheffield*. *ib.* 243; *Winter v. Drury*, 1 Selden's R. 525; *Chapman v. White*, 2 *ib.* 412; also, *Mandeville v. Welch*, 5 Wheat. 286.

3. But, even if *Connoley v. Cheesborough* is adhered to, so far as this general proposition is concerned, it cannot be regarded as an authority under the particular facts of this case. In that case, but one bill was drawn for the entire amount; here, two separate bills, each for a part of the fund only, and the two together exceeding the amount of that fund. The two bills must be regarded separately, and cannot be consolidated into one; and this brings it within the principle, asserted in that case, "that if a bill be for only a part of the funds in the hands of the drawee, then the assignment cannot be considered as complete, until there has been an acceptance or an agreement to pay." In that case, too, the drawee did not deny the drawer's right to draw the bill, and his only reason for not paying was, that the debt had been attached after the draft had been drawn; while here, it is obvious that he would not have accepted, because the amount, on examination, was found not correct.

JOHN T. TAYLOR, *contra*:

*Connoley v. Cheesborough*, 21 Ala. 166, is the law of this State, and is decisive of this case. It is here shown that the whole sum in the drawee's hands had been drawn for, that the drafts had been passed to an innocent holder, had been duly presented, and had been in the drawee's hands for two days when the garnishment was served; he retaining them, perhaps, for the express purpose of being garnisheed. It is shown, also, that the drawer had previously drawn for the whole amount at once, but the drawee would not pay in that way; and for his accommodation the two drafts were substituted, giving him time on one. The holder cannot, under such circumstances, lose his lien.—Code, §§ 1533, 1535, 1536.

GOLDTHWAITE, J.—By the Code (section 1532) it is provided, that "no person, within the State, must be charged as the acceptor of a bill of exchange, unless his acceptance is in writing, signed by himself or agent." The object of this provision was, to secure unmistakable evidence to charge the acceptor; and no right could, therefore, accrue to any one upon a verbal promise to pay or accept, unless the party to whom it was made had, on the faith of such promise, nego-

tiated the bill.—Code, § 1535. But this section has no application to the facts as disclosed by this record. Neither, in the present case, can the retention of the bills by the drawee, for more than twenty-four hours, amount to an acceptance (Code, § 1536), for the reason, that the only legitimate inference to be drawn from the answer of the garnishee is, that he was permitted by the agent of the holder to retain them until the following Monday, and consequently no legal obligation could be created against him as acceptor during that day.

The judgment rendered can, therefore, only be sustained on the ground, that the drawing of the bills, and their presentment to the drawee, was an assignment to the payee of the amount in his hands belonging to the drawer; the aggregate of the sums drawn for exceeding that amount. In *Connoley v. Cheesborough*, 21 Ala. 166, the sum drawn for was greater than the amount in the hands of the drawee; and it was held, that upon notice to the latter, it operated as an assignment of the whole fund. But the judge who delivered the opinion in that case concedes, that had the draft been for part of the funds only, it could not be an assignment until accepted; and this is unquestionably true, even in cases where the order is not a bill of exchange, and is drawn upon a special fund; and the reason assigned by Judge Story, in *Mandeville v. Welch*, 5 Wheat. 286, is, that it would be permitting a creditor "to split up a single cause of action into many actions, without the assent of his debtor." Here, the record shows that two drafts were drawn, each being for less than the amount in the hands of the drawee; and that being the case, if we were to rest on *Connoley v. Cheesborough*, *supra*, neither of the drafts could operate as an assignment of the amount of the fund they were drawn for, nor could both of them have that effect as to the aggregate amount, for, in either case, it would enable the creditor to split up his demand.

But we are not satisfied to rest our decision on this ground. The drafts here are not payable out of the special fund. They are bills of exchange, and we cannot, without varying their legal effect, say that they are drawn upon the particular, rather than the general fund. They can create no liability in favor of the payee against the drawee, until the latter has



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Fluker v. Henry's Adm'r.

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accepted them; and, until then, they do not amount to an assignment of the funds in the hands of the drawee. The case in our own court to which we have referred, is wrong, and is not sustained by the authorities which are cited to support it. *Mandeville v. Welch, supra*; *Harris v. Clark*, 3 Coms. 93; *Cowperthwaite v. Sheffield*, 3 *ib.* 243; *Winter v. Drury*, 1 Seld. 525; *Chapman v. White*, 2 *ib.* 412; *Tiernan v. Jackson*, 5 Pet. 580.

As the drawee was garnisheed before his liability to the defendant in attachment had been changed, the debt should have been condemned in his hands.

Judgment reversed, and cause remanded.

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### FLUKER vs. HENRY'S ADM'R.

[ACTION ON PROMISSORY NOTE BY PAYEE AGAINST MAKER.]

1. *Principal and surety*—*New contract between surety and creditor*.—If the surety on a note, given for the purchase money of a slave, executes his own note to the payee "in discharge of the balance remaining due", and takes up the original note, his position as surety is exchanged for that of creditor; he becomes the principal in his new note, and cannot defeat a recovery on it, by setting up fraud in the sale of the negro, or a breach of the warranty of soundness.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by the appellee, as administratrix of Edward Henry, deceased, on a promissory note for \$559 47, executed by the defendant, Baldwin M. Fluker, dated April 15, 1851, and payable one day after date to E. Henry or bearer. The only plea was the general issue, with leave to give any special matter in evidence.

At the trial, after the plaintiff had offered in evidence the note sued on, the defendant introduced evidence tending to show that, in the year 1849, J. G. Dent & Co. had purchased

a negro from said Edward Henry, plaintiff's intestate ; and then introduced said Henry's bill of sale of said slave, which was under seal, and contained a warranty of title and soundness. He introduced evidence, also, "tending to show that said J. G. Dent & Co. gave their promissory note to said Henry for the price of said slave, with himself (defendant) as surety to the same ; that said Dent & Co., immediately after the purchase of said slave, went into Tennessee, and commenced working on a railroad where they had taken a contract, and carried said negro with them ; that defendant, whilst they were so operating in Tennessee, after part of said original note had been paid, lifted it, by giving the note now sued on, in discharge of the balance remaining due on said original note, which balance was the amount of the note now sued on. Defendant then introduced one John Deborde as a witness, who testified, that he was employed by said J. G. Dent & Co. to work on said railroad ; that some time in June, 1849, about the time of the purchase of said negro, witness left Talladega, in advance of said Dent & Co. and their hands, for said railroad ; that J. G. Dent & Co. arrived in Tennessee, within fifteen days from the time witness left, at the place of operating, with their hands and implements, the said negro being one of them ; that he discovered, on the day of their arrival, that said negro was very short-winded, and breathed like he had (what witness called) 'the bellowses', and complained of pains in his side or chest ; that within three or four weeks after his arrival, his feet and ankles were swollen, and the swelling extended up his legs and system, and in twelve or fifteen months he died ; that said negro did not work more than one-third of his time, in consequence of his complaints, and when he did work was not able to do a full hand's work ; that he would not have hired for anything in his then condition ; that a good deal of the time he had to be attended to and waited on by some one of the other negroes ; that the wages of a hand were usually about \$13 per month and boarded ; that the negro, as he was when witness saw him, was worth nothing.

"Plaintiff moved to exclude all the evidence of this witness, on the ground that defendant could not recoup damages for a breach of warranty made to J. G. Dent & Co.; and thereupon

defendant stated to the court, that he would prove, in connection with what Deborde had testified to, that said negro was diseased at the time said Henry sold him to J. G. Dent & Co., and long before that time, and that said Henry knew it; and stated, that the testimony of Deborde was offered in connection with this, which he would introduce in the further progress of the trial. Defendant also offered to prove, in connection with the testimony of Deborde, that J. G. Dent was in fact defending this suit, and had employed the attorney who conducted the defence, and had authorized him to make any defence which could be made available by him as a party really interested. Defendant further insisted, that the evidence of Deborde was good, of deceit and fraud, or failure of consideration. The court, notwithstanding, excluded the evidence, and the defendant excepted."

The exclusion of this evidence is now assigned for error.

J. J. WOODWARD, for the appellant, contended,—

That the original note could have been successfully defended, without returning the negro, if fraud was practiced.—*Ricks v. Dillahunt*, 8 Port. 133; *Williams v. Cannon*, 9 Ala. 350; 13 Johns. 302; 14 Pick. 217; *Chitty on Contracts*, 402. If it was void for fraud, there is no consideration for the note sued on.—*Huckabee v. Albritton*, 10 Ala. 660. The surety can make any defence which the principal could.—9 Ala. 46; 7 *ib.* 837; 13 *ib.* 773. The giving of a new note is no more obligatory than a parol promise, which does not preclude such defence.—*Huckabee v. Albritton*, *supra*. The cases of *Langdon v. Roane*, 6 Ala. 520, and *McGowan v. Garrard*, 2 Stew. 479, though at first view inconsistent with this position, on examination will be found not to be so.

ALEX. & JOHN WHITE, *contra*, insisted, that the doctrine of recoupment only applies where there are mutual promises, between the same parties, made at the same time, and in relation to the same subject-matter.—*Hatchett & Bro. v. Gibson*, 13 Ala. 593; *Hill v. Bishop*, 2 *ib.* 320; *Green v. Linton*, 7 Port. 141; *Batterman v. Pierce*, 3 Hill, 174; *Craddock v. Stewart*. 6 Ala. 82.

RICE, J.—The giving of the note sued on by the defendant, “*in discharge* of the balance remaining due on the original note”, changed the relation between him and J. G. Dent & Co. On the original note, he was their *surety*; but by giving his own note, “*in discharge*” of it, he became their *creditor*. He cannot, in this suit, be regarded as their surety, or as entitled to make any defence which rests upon the existing relation of principal and surety. He is the principal, the *sole principal*, in the note sued on, and must be so treated in the present action.—Lyth v. Ault, 11 Eng. Law & Eq. R. 580.

It may be conceded, that the evidence offered by the defendant and excluded by the court would have been admissible, in a suit against him, on the original note.—Evans v. Keeland, 9 Ala. 42; Lynch v. Bragg, 13 *ib.* 773. It may also be conceded, that the evidence should not have been excluded, if it tended to prove that the original note was void; or that the note sued on was given merely as a renewal; or that it was without any consideration; or that its consideration had failed, either in whole or in part.—Bullock v. Ogburn, 13 Ala. 346; Holt v. Robinson, 21 *ib.* 106. But these concessions cannot help the defendant. There was a valid consideration for each note. There is no evidence of any failure of the consideration of the note sued on. If a defence, either total or partial, could have been made to the original note, *in consequence of fraud in the sale of the negro for which it was given, or of the breach of the warranty of his soundness*, the discharge of that note, by giving the note here sued on, destroys the right of *the defendant* to make *that defence in this suit*.

There is no error in excluding the evidence which was excluded; and the judgment is affirmed.



FREEMAN *vs.* SCURLOCK ET AL.

[TROVER FOR CONVERSION OF SEVERAL SLAVES.]

1. *Instructions to jury, that they must find for defendant if they believe all the evidence.* The court is authorized to instruct the jury, that if they believe all the evidence they must find for the defendant, only in cases where a demurrer to the evidence, if interposed, might properly have been sustained ; such a charge, therefore, should never be given, where there is any evidence which reasonably tends to establish the plaintiff's case.
2. *Conversion defined.*—To constitute a conversion, it is not necessary that the party should have had the exclusive control, or actual manucaption of the goods : the term embraces, in its legal import, any intermeddling with, or dominion over the property of another, subversive of the rights of the true owner ; as, if the defendants are actually present, aiding and assisting another in the unlawful design of removing plaintiff's slaves from the State, with the intention of wrongfully depriving him of his property, even though it be for the use and benefit of his wife, each act, in furtherance of the common design, is the act of all, and all are guilty.
3. *Facts reasonably tending to show conversion.*—On a separation between plaintiff and his wife, and a division of their property had by consent, the slaves here sued for in trover were allotted to the wife, and afterwards went into the possession of her brother, against whom plaintiff brought detinue. The sheriff went with the process to the neighborhood in which the slaves were, but did not find them ; and on the second or third night afterwards, the wife, in company with a minor brother, who is one of the defendants in this action, started with the slaves to Montgomery. They were met by the other defendant, with his wagon, at 11 o'clock that night, several miles from the place of starting, and proceeded in his wagon to Montgomery ; traveling by an unusual route. At Montgomery, the wife and her brother, with the slaves, took passage on a boat, and proceeded to Texas, where she and the slaves remain : and the other defendant returned home. The bill of exceptions states, also, that there was evidence "tending to show that the defendant's wagon had been engaged without telling him the object, that neither of the defendants exercised control over the slaves, and that the brother went to Texas as the escort of his sister" : *Held*, that the evidence reasonably tended to prove a conversion, and that the court therefore erred, in instructing the jury that, if they believed all the evidence, they must find for the defendants.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Holman Freeman, the appellant, against William L. Scurlock and Thomas Cliett, to re-

cover damages for the conversion of two slaves, Lucy and her infant child. As the substance of the evidence is embodied in the opinion of the court, it is unnecessary to state it in this place. The charge of the court, which is here assigned for error, was, "that if the jury believed all the evidence offered by the plaintiff, to show a conversion by the defendants, it was not sufficient to establish a conversion by both the defendants, or by either of them, and they must find for the defendants; to which charge plaintiff excepted."

GEO. W. GUNN, for the appellant:

1. Any intermeddling with the personal goods of another, adverse to the rights of the owner, is a conversion.—1 Chitty's Pl. 154; Thorp v. Burling, 11 Johns. 285. So, where one assumes to exercise control or dominion over goods, in exclusion of the rights of the owner, even though there be no manual taking.—Abercrombie v. Bradford, 16 Ala. 568; Gray v. Crocheron, 8 Port. 191. Any use, or disposition of a chattel, without the assent of the owner, and inconsistent with his rights, is a conversion.—Hutchinson v. Bobo, 1 Bailey's R. 546; Reid v. Colcock, 1 Nott & McC. 594; Murray v. Burling, 10 Johns. 172; Parminter v. Kelly, 18 Ala. 716; 5 Conn. 323. If the defendants, with a knowledge that the slaves were about being taken off, in order to keep them from the plaintiff, aided and countenanced the act, or were present and in company for that purpose, they are guilty of a conversion. Nelson v. Iverson, 17 Ala. 222; Glaze v. McMillion, 7 Port. 281; Scott v. Perkins, 28 Maine, 22; Clark v. Whitaker, 19 Conn. 319; Ripley v. Dobbin, 6 Shep. 382; Hare v. Pearson, 4 Ired. 76; Maguyer v. Hawthorn, 2 Harrington's (Del.) R. 71; Connah v. Hale, 23 Wend. 462; Prescott v. Wright, 6 Mass. 20; Pierce v. Benjamin, 14 Pick. 356; Brown v. Brown, 13 Ala. 212; Lee v. Matthews, 10 *ib.* 682; Pool v. Adkisson, 1 Dana, 118.

2. The consent of plaintiff's wife cannot purge the act: trover lies, though the act was done by her order or direction. The wife is not, *prima facie*, the agent of the husband for the purpose of lending or otherwise disposing of his property; nor has she authority to appoint an agent.—1 Russell on Crimes, 19; 2 *ib.* 155; People v. Schuyler, 6 Cowen, 572;

Prescott v. Wright, 6 Mass. 20; Benjamin v. Benjamin, 15 Conn. 347; Birdseye v. Flint, 3 Barb. 500.

3. The defendant Scurlock can claim no protection from his infancy, since an infant is liable in trover.—Vasse v. Smith, 6 Cranch, 226; 1 Chitty's Pleading, 76.

4. If there was any evidence of conversion, however slight, the charge of the court is erroneous, since the jury are the sole judges of the weight and sufficiency of the evidence; and an examination of the evidence set out in the record, tested by the principles established by the authorities above cited, leads to the irresistible conclusion, that there was a settled determination on the part of these defendants, or of others with whom they united, to deprive plaintiff of his property.

CLOPTON & LIGON, *contra*:

1. Whether certain acts, when proven, amount to a conversion, is a question of law, to be determined by the court. 3 Stephens' N. P. 2704. The court, then, was authorized to charge the jury, there being no conflict in the testimony, that the facts proven did, or did not, amount to a conversion. Gray v. Crocheron, 8 Port. 191.

2. To maintain trover, two things must concur—property in the plaintiff, and a conversion by the defendant; and this conversion may arise in four ways—viz., by a wrongful taking, by an illegal assumption of ownership, by an illegal use or misuse, and by a wrongful detention.—Glaze v. McMillion, 7 Port. 280. The evidence in this case shows neither of these, and consequently no conversion: there was no repudiation by the defendants, or either of them, of the plaintiff's right to the property, and no exercise of dominion over the property inconsistent with that right; without which there is no conversion for which trover lies.—Heald v. Carey, 9 En. Law & Eq. R. 429.

3. The idea of property is of the essence of a conversion. It is an assertion of ownership by the defendant, either permanent or temporary. An interference with a chattel, under circumstances which show the owner's right to be undisputed, even with injurious consequences to the owner, does not amount to a conversion.—Nelson v. Whetmore, 1 Rich. Law R. 322. The defendants here, so far as the property was

concerned, were entirely passive ; and when that is the case, there is no conversion.—*Ragsdale v. Williams*, 8 Ired. 498. The evidence will not authorize the inference, that the defendants intended to appropriate the property to their own use, or to the use of any other person, unless it be plaintiff's wife, in whose possession plaintiff himself had placed the property four years previously ; or that any act was done by them, which had the effect of destroying or changing the quality of the chattel.—*Glover v. Riddick*, 11 Ired. 587; *Fouldes v. Willoughby*, 8 Mees. & W. 540.

4. To support trover, there must be proof of an actual or virtual possession in the defendants, otherwise they cannot be charged with a conversion.—*Traylor v. Horrall*, 4 Blackf. 317. In this case, the evidence shows neither an actual nor a virtual possession in either of the defendants.

5. Whilst infancy is no bar to an action of trover, it may yet have some influence in determining whether there is really a conversion.—*Vasse v. Smith*, 6 Cranch, 231. And the defendant Scurlock, being a minor, cannot be guilty of a constructive conversion.

6. The wife must be regarded, in the absence of the husband, as having a general authority to exercise the usual and ordinary control over his property, which must be possessed by some one : in the absence of rebutting testimony, her possession is that of her husband. The evidence here shows, that the negroes, at the time of the alleged conversion, were in the possession and under the control of plaintiff's wife, into whose possession he had previously permitted them to go ; and the defendants committed no act inconsistent with this disposition of them.—*Church v. Landers*, 10 Wend. 79; *Jones v. Jones*, 3 Strobb. 316.

7. Considering the case in the strongest view against the defendants, they could not be guilty of a conversion, unless Mrs. Freeman, had she been other than the plaintiff's wife, was also guilty of a conversion. Considering her as a stranger to plaintiff, the negroes having been placed in her possession by him, she became his bailee, and cannot be charged with a conversion, unless she had done something with the property inconsistent with the object and design for which it was placed in her possession. That object was, for her use



and support ; and the evidence does not show any use of the property inconsistent with that end. Again ; since her taking was not tortious, a demand and refusal were necessary to show a conversion, and, *a fortiori*, to authorize a recovery against defendants.—Glaze v. McMillion, 7 Port. 280 ; 3 Stephens' N. P. 2704.

CHILTON, C. J.—1. His Honor charged the jury, that the evidence was not sufficient to make out a conversion of the slaves, against either of the defendants. This charge can only be supported, in cases where, had the party in whose favor it was given demurred to the evidence, the judge might properly have sustained the demurrer. In such case, as the party demurring to the evidence is required to admit as a fact what the evidence tends reasonably to establish, so that the duty of trying the facts shall not be devolved upon the court, but merely the duty of declaring the law arising upon them, (Bryan v. The State, 26 Ala. R. 65,) it follows, that if there be any evidence which reasonably tends to show a conversion of the slaves by either of the defendants in the case before us, the charge cannot be supported. We say that such would be the case, where the evidence *reasonably tends* to prove a conversion ; for we are not prepared to hold, that where the testimony adduced is so light and inconclusive, that no rational, well-constructed mind can infer from it the existence of the fact which it is offered to establish, we should reverse the cause, should the judge instruct the jury to disregard it.—Clarke v. Marriott, 9 Gill, 331. It is not necessary, however, in view of the facts of this case, to decide this point.

The slave Lucy and her child were shown to belong to the plaintiff. The deed, executed upon the separation between him and his wife, attempting to vest in the wife the title to said slaves, was inoperative as respects the husband's legal rights, whatever might have been its effect in a court of equity. The plaintiff had sued in detinue the brother of his wife, to recover said slaves, and an order for their seizure by the sheriff had been obtained. The sheriff, with this process, had gone to the neighborhood from which they were taken, as will presently be stated, in search for them, only two days before

they were carried off. The slaves, with Mrs. Freeman and her two brothers, one of them the defendant in the detinue suit, and the other the defendant in this action, all left the premises of Mrs. Scurlock, where they had been for some time, in the night. Cliett, the other defendant, met them, with the wagon in which they went to Montgomery, three and a half miles from where they started, at eleven o'clock at night, and they all went to Montgomery together. They were, when Cliett met them, twenty-five miles from Montgomery, and traveled an unusual route,—were stopped that night by high water, and went on to Montgomery next day, where the defendant, Wm. Scurlock, and his sister, Mrs. Freeman, proceeded to Texas with the slaves by steamboat; and T. Scurlock and Cliett returned home. It appears that neither Mrs. Freeman, nor the slaves, have since returned to this State. It is stated in the bill of exceptions, that it was in evidence “that the party expected to be met, or interrupted, that night by the plaintiff, and that they had nothing to say out of the family about their determination to take the negroes off. There was evidence, also, tending to show that T. Scurlock had engaged Cliett's wagon, without telling him the object, and that neither Cliett nor Wm. Scurlock, who was a minor, exercised control over the slaves, and that the latter went to Texas as the escort of his sister.”

Now, we desire to express no opinion upon the facts of this case. It is the province of the jury to try the facts. But the question, whether there was evidence reasonably tending to establish a conversion, is necessarily involved in our decision of the cause. If there was, it was not competent for the judge to withdraw it from the jury, who alone were the judges of its sufficiency.—*Sims v. Glazener*, 14 Ala. R. 695; *Nelson v. Iverson*, 19 Ala. R. 95.

2. That the proof *tended* to establish a conversion, on the part of both the defendants, we do not entertain a doubt. What is a conversion? It is not confined to the unlawful turning, or applying of the personal goods of another, to the use of the taker. Nor is it necessary to constitute a conversion that the party should have had the exclusive control or dominion over the goods, or the actual manuecaption of them. The term has a more enlarged legal import, and embraces

any intermeddling with, or dominion over such property, subversive of the dominion of the true owner, or of the nature of the bailment, if it be bailed. If one person assist another in taking and removing the goods of another, and placing them without the owner's control, or beyond his power to obtain them, with intent to appropriate them to his own or another's use, and does it under such circumstances as afford reasonable notice that such removal is unlawful, and in derogation of the rights and subversive of the dominion of the true owner, they are both equally guilty. A forcible illustration of this principle is afforded by the case of *Thorp v. Burling*, 11 Johns. R. 285. See, also, 1 Nott & McCord, 592; 1 Har. & Johns. 519; 7 Johns. R. 254; 10 *ib.* 172; 14 *ib.* 128.

It was for the jury to determine whether the parties were not participating in and forwarding a common design to get the property out of the country, and to deprive the true owner of it. If there was no such design, or the defendants acted under such circumstances as to afford them no reasonable notice of it if it existed, they would not be liable, any more than the boat that, in the best of faith, may have taken them down the river.—8 Excheq. R. 540. But then the jury had the right to look to the circumstances. Why start off in the night, when the sheriff was known to be hunting for the slaves? Why does Olett meet them at eleven o'clock at night,—an unusual time for a female to set out upon a journey? Did he engage to do this without a knowledge of the emergency?—without making inquiry as to why they did not go in the day time? He finds them on the road three and a half miles from where they live, at this late hour, going to Montgomery with these slaves. Would such a circumstance excite no suspicion of wrong? Would not an honest, prudent man very naturally suppose that the parties were absconding with these slaves? Without answering these queries, it is enough that they naturally arose from the evidence, and were improperly excluded from the jury.

If the defendants united with Theodosius Scurlock in the unlawful design of removing the slaves, and actually carried out that design, by going with them to Montgomery, that they might be taken on to Texas for the benefit of Mrs. Freeman, they are guilty of a conversion, and no demand is necessary.

It matters not which of them told the slaves to get in or out of the wagon which conveyed them, or appeared to exercise the control. Being actually present, aiding and assisting, with the intention of wrongfully depriving the owner of his property, each act, in furtherance of the common design, is the act of all, and all are liable.

As this is the only question presented by the charge, we deem it unnecessary to go further and notice others made in the argument.

Let the judgment be reversed, and the cause be remanded.

## HALL vs. MAGEE & REID.

[ANCILLARY ATTACHMENT AND GARNISHMENT.]

1. *Garnishees discharged on answer.*—Garnishees answered, that the defendant in attachment, being indebted to their firm in the sum of \$2,000, agreed to serve them as bookkeeper for the year, at a salary of \$1,500, payable monthly; that he was to receive in money only enough to pay the necessary expenses of his family, and the balance of his salary was to be applied to the liquidation of his said debt; and that they had paid him about \$500, which was a reasonable sum, for his family expenses: *Held*, that no judgment could be rendered against the garnishees on this answer, either under the Code (§ 2517) or under the act of 1854 (Acts 1853-4, p. 26, § 4).

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THE appellant, having recovered a judgment against Augustus L. McCoy, for \$300, summoned the appellees by process of garnishment as his debtors. The garnishees appeared, and filed the following answer: "That said McCoy has been in the employ of Magee & Reid, as bookkeeper, for some time past, at a salary of \$1,500, payable monthly. At the beginning of the year (last November), said McCoy had overdrawn his account, and had become indebted to said Magee & Reid in the sum of \$2,005 26, or thereabouts; and they had also become liable, previous to said 1st November, 1853, for ac-



counts and claims against said McCoy, to the amount of about \$500. Said Magee & Reid then agreed, on said 1st November, with said McCoy, that if he would serve them faithfully as bookkeeper, for one year from that day, they would allow him at the rate of \$1,500 a year, payable monthly ; provided that said McCoy should receive from it in money only enough to pay the necessary expenses of his family, which consisted of himself, his wife, and four children, and all the remainder of his salary should be applied, as it became due and payable, towards the reduction of the amount of his said indebtedness to them, and towards the payment of the accounts for which they had become responsible for him as aforesaid. Since that time, said garnishees have paid for said McCoy, upon the said accounts for which they had become responsible, the sum of \$323 53, and are still responsible for \$201 78. Said McCoy has been acting as bookkeeper for garnishees, under said contract, from the 1st November, 1853, to the present time ; but they are advised and believe, that in case of the sickness or death of said McCoy, or in case of his any time failing or refusing to continue to perform his duties under said contract, their liability under said contract would cease and determine. Said garnishees have paid said McCoy, for the necessary expenses of himself and family, since the 2d day of December last, the sum of \$502 38, which they consider a moderate sum for the expenditures of such a family, in this city, for that length of time ; and they are satisfied, that if they had at any time stopped paying for the necessary expenditures of said McCoy's family, he would have ceased at once to labor in their employ, and in case of their ceasing to pay for such necessary expenses at any time hereafter, said McCoy would immediately cease to labor in their employ. Said Magee & Reid have no property or effects of said McCoy," &c.

On this answer, the court discharged the garnishees, and its judgment is now assigned for error.

CHARLES P. ROBINSON, for appellant.

P. HAMILTON, *contra*.

GOLDTHWAITE, J.—The answer discloses that McCoy was indebted to the garnishees more than two thousand

dollars, and agreed to serve them as bookkeeper for the year, to be allowed for his services fifteen hundred dollars, payable monthly; that he was to receive in money only enough to pay the necessary expenses of his family, and the residue of his salary was to be applied to the liquidation of the debt owing by him to the garnishees. This being the contract between the parties, the understanding must have been, of course, that the amount to be paid to McCoy in money was not to be affected by his indebtedness to the garnishees; and as the parties had a perfect right to make such a contract, it would necessarily follow, that if a suit had been brought by McCoy, to recover the amount which by the terms of the agreement he was to receive in money, the garnishees could not, under such circumstances, oppose his debt to them as a set-off.

But the difficulty in the present case arises from the fact, that McCoy was to receive in money such an amount only as was necessary to pay the expenses of his family, and the payment could only have been enforced in an action on the agreement itself; for the amount is uncertain, and the assumpsit of a character which the law would not imply. We have frequently held, that the remedy by garnishment did not extend to such cases—that only those demands were within its reach, which could be recovered by debt, or *indebitatus* assumpsit.—*Self v. Kirkland*, 24 Ala. 275; *Cook v. Walthall*, 20 *ib.* 334; *Bostwick v. Beach*, 18 *ib.* 80; *McGehee v. Walke*, 11 *ib.* 273. And the principle of these decisions is not affected by the Code (§ 2517), which, while it authorizes the application of the remedy to a debt which is not due, does not in any respect change the character of the demand which is the subject of garnishment. Whether due or not, it must be sufficiently certain to have authorized the party to whom it was due to maintain the actions we have mentioned.

Neither is the case affected by the 4th section of the act of 18th February, 1854, (Acts 1853-4, 26.) which does not make the salary, or wages, in every case the subject of garnishment, but simply exempts a certain portion of the salary in those cases in which it could be reached by this remedy.

As the demand which would have been owing by the garnishees at the time of their answer, was not in itself subject

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to garnishment, the fact that it was paid by them can make no difference. If, indeed, at any time before the answer, the contract had been changed, so that the garnishees, if they had not paid, would have been liable either in debt or *indebitatus* assumpsit, the case might have been different, but there was no such change.

Judgment affirmed.

## RUTHERFORD'S ADM'R vs. SMITH.

[SUMMARY PROCEEDING BY SURETY AGAINST ADMINISTRATOR OF DECEASED  
CO-SURETY.]

1. *Summary proceeding, if record show jurisdiction, like other suits.*—A statutory proceeding by notice and motion, on the part of a surety against his co-surety, if the defendant appears and pleads, and the issues are tried by a jury, is like any other case commenced in the ordinary mode, except that the record must show that the court had jurisdiction.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. ANDREW B. MOORE.

MOTION by John N. Smith for a statutory judgment against the appellant, as administrator *de bonis non* of William Rutherford, deceased, who was co-surety with said Smith on a note for \$6,300 57, on which one William Bowen was principal, and on which a judgment was recovered against him and said Smith; which judgment Smith was compelled to pay, Bowen being insolvent, and Rutherford dead.

J. H. CAMPBELL, for the appellant.

GEO. W. STONE, *contra*.

RICE, J.—This is a summary proceeding, by one surety against a co-surety, under the act of 1821.—Clay's Dig. 531, § 4. The motion is in writing, and was duly served; and alleges all the facts which are necessary to give the Cir-

cuit Court jurisdiction, and to entitle the appellee to judgment against the appellant. This motion, and its service, constitute part of the record; and upon it, issues appear to have been made up by the parties, and tried by a jury.

Although the proceeding is summary, yet, as the appellant (who was the defendant in the motion) appeared, and pleaded, and formed issues, which were tried by a jury, it is like any other case commenced in the ordinary mode, except that it must appear upon the record that the court had jurisdiction to entertain the motion.—*Smith v. Br. Bk. Mobile*, 5 Ala. R. 26; *Curry v. Bank*, 8 Porter's R. 372; *Broughton v. Robinson*, 11 Ala. R. 929.

A mere comparison of the motion with the statute, shows that the motion sets forth every fact necessary to give the court jurisdiction. As the jurisdiction of the court appears upon the record, and the jury found the issues for the appellee, and no exceptions were taken in the court below, there is nothing to warrant a reversal of the judgment.

Judgment affirmed.

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## IVERSON & ROBINSON vs. DUBOSE.

[ACTION OF EJECTMENT UNDER CODE.]

1. *No adverse possession against United States*.—Adverse possession cannot be set up to defeat or avoid a patent from the United States government, since there can be no adverse possession against the government itself.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. NAT. COOK.

THIS action of ejectment (Code, §§ 2209, 2210) was brought by the appellants, Alfred Iverson and Alex. J. Robinson, to recover an undivided moiety of the east half of section twenty-three (23), in township twelve (12), range twenty-eight (28), east. The bill of exceptions is as follows:—



“On the trial of this cause, the parties agreed that the pleadings should be considered as filed, so as to allow any evidence to go to the jury which was legal and admissible in such actions. Thereupon the plaintiffs introduced in evidence a patent for the land sued for, dated August 6, 1852, which recited (among other things), in substance, that Marpokay, a Creek Indian, had become entitled to the east half of section 23, in township 12, range 28 east; that said Indian, with the approbation of the President, had sold the same to Eli S. Shorter and John S. Scott; that Samuel A. Grier, as attorney in fact of said Scott, had transferred the interest of said Scott to Allen M. Irby, who transferred to plaintiffs;—and the said patent then grants one undivided half of said tract to said Shorter, and the other undivided half to plaintiffs. Plaintiffs proved, also, that a few days prior to the commencement of this action, they demanded of defendant one undivided half of said half-section, and that defendant refused to give up possession of the same, or any part thereof, but denied plaintiffs’ right to any part of said tract, and claimed the whole of it in his own right; that defendant was in possession of said half-section at the date of the demand and suit; that plaintiffs, and those under whom they claimed, had never resided in this State; and that defendant, between the summer of 1843 and the commencement of this action, had been absent from this State more than eighteen days at one time.

“The defendant then proved, that he purchased said half section of land, in 1838, from one John T. Wise, and went into possession of the same under said purchase; that there was on the said land, at that time, an old Indian field of about sixty acres, and the balance of the tract was in a wild state; that he had been in possession of said land, since 1838, up to the time of this suit, had cleared most of it, and had been cultivating the same as his own during all that time. Defendant offered in evidence, also, a bond, which (he proved) was executed to him by said John T. Wise on the 3d May, 1839, conditioned to make title to said tract of land on the payment of the purchase money; to which the plaintiffs objected, on the ground that said bond was irrelevant and showed no right in the defendant to defeat this action; which objection the court overruled, and allowed the said bond to

be read in evidence, and plaintiffs excepted. Defendant also proved payment of the purchase money to said Wise, and that said Shorter and Scott had both departed this life ; and read in evidence duly certified copies of the approved conveyances of said land by said Indian to said Shorter and Scott in March, 1834 ; also, of the power of attorney from Scott to Grier, November, 1841 ; also, of the conveyance of said land by Grier to Allen M. Irby, April, 1842 ; also, of the conveyance of said land by Irby to plaintiffs, January, 1850. The last conveyance recited, as its consideration, \$1000, for the undivided moiety of seventy-one sections and half-sections of land, including the one in suit ; and all said intermediate conveyances of the land sued for were recited in the said patent. The power of attorney from Scott to Grier gave authority to sell, transfer, and convey such lands as the said Scott might own, or have any right, title, or claim to, in Alabama, Georgia, or Florida, (among which was the land sued for,) and to collect all moneys due said Scott in those States, by those indebted to him, his agents, or attorneys.

“This being all the evidence, the plaintiffs asked the court to charge the jury, that so far as the defendant attempted to avoid the said patent, and to defeat a recovery by plaintiffs on account of his adverse possession of the land sued for, the evidence was insufficient to show such adverse possession by him as would avoid said patent and defeat plaintiffs’ recovery in this action ; which charge the court refused to give, and the plaintiffs excepted.”

The refusal to give this charge is now assigned for error.

JAS. L. PUGH, and JAS. E. BELSER, for appellants :

The doctrine of adverse possession does not affect the issuance of a patent, which can be avoided where it issues in fraud, or contrary to the authority of law. The reason of the law, which inhibits the sale of land in the adverse possession of another claiming title, does not apply to sales made under the authority of law. The President had authority, and it was his duty, to issue the patent. The legal title to the land was in the United States, and possession cannot be adverse to it.—Haden v. Ware, 15 Ala. 149; *Doc ex dem.* Nickles v. Haskins, *ib.* 619.

JEFF. BUFORD, *contra*, made the following points:—

1. The assignments from Scott to Irby, and from Irby to the plaintiffs, were valid as between the parties, and also, perhaps, as between the assignees and a mere intruder without color of title; but not as against an honest occupant under *bona fide* color of title, whose right it is to be removed only by due course of law—to have his title tested before the judiciary, at the suit of him claiming at the inception of his adverse possession, and not at the suit of some more powerful buyer of lawsuits, to whom the title was afterwards transferred.—*Mitchel v. United States*, 9 Pet. 713. Such an occupant may avail himself of the legal maxim, that the sale of a lawsuit confers no title. The purchaser cannot be permitted to evade the effect of this principle, by ensconcing himself behind the machinery of a patent subsequently acquired: to allow this, would be to yield to indirection what is denied to a more manly attack, and to facilitate one in taking advantage of his own wrong. The defendant does not rely on his adverse possession as against the United States, but on his adverse possession against the plaintiffs at the inception of their title; and he insists that plaintiffs, as against him, never acquired any title, nor the right to have a patent issued to them, and that therefore it is void. The issuance of a patent is a mere ministerial act, to be performed according to law; a void patent does not authorize a recovery, even at law, against a party in possession under color of title; and a patent may be void against one, and not against another.—*Stoddard v. Chambers*, 2 How. (U. S.) R. 317; *Ladiga v. Roland*, *ib.* 582; *Crommelin v. Minter*, 9 Ala. 594; *Nance v. Strickland*, 19 *ib.* 233; *King v. Stevens*, 18 *ib.* 476; *Cook v. Webb*, *ib.* 811; *Saltmarsh v. Crommelin*, 24 *ib.* 352.

2. The ultimate fee, the right of eminent domain, can only reside in the State as lord paramount, and not in the United States, a mere private land-owner within its limits. The title which passed to the reservee, or his assignee, under the treaty and reservation, had all the incidents and qualities of a fee—right of possession of realty, and a right of action for it; a right vendible, inheritable, and liable to execution.—9 Port. 354; 23 Ala. 413, 636. The patent, then, did not pass the fee: it is not title, but evidence only of title; and if the inter-



mediate conveyances are essential to show the authority to issue a patent, and are themselves void as against the defendant, the patent itself, being issued without authority, is also void.—Cases *supra*.

CHILTON, C. J.—The Indian reservee had a legal right to occupy the land in controversy under the treaty of 24th March, 1832, and to maintain an action at law for its recovery, if improperly kept out of possession.—*Ladiga v. Rowland*, 2 How. (U. S.) Rep. 581. The treaty also conferred power upon the reservee to convey his reservation, for a fair consideration, to any other person, in such manner as the President of the United States should direct. The conveyance, however, was required to be certified by some person appointed by the President, and was not to be valid until the President approved the same. A patent was to be issued to the purchaser upon the completion of the payment. If the reservee made an appointment by deed of the person to take the title from the Government, and this was approved by the President, this vested an inchoate title in the purchaser, which would maintain an action at law, and which was subject to be sold under execution against such purchaser. See *Rosser v. Bradford*, 9 Port. R. 354. Nevertheless, the ultimate fee could only pass out of the government of the United States by some of the modes pointed out by law; and in this case, by the issue of a patent to the purchaser, or his alienee. The title remaining in the Government, there could be no adverse possession which could avoid the patent, as there can be no adverse possession against the Government. When a patent issues to the Indian's appointee, it operates as a grant from the Government directly to such appointee; and the intermediate conveyances, or transfers, are only essential as showing the authority of the Government to issue it to the particular person to whom it is awarded.

If a party is in possession adverse to him who applies for a patent, he may file his *caveat* in the proper department of the Government, and show that the applicant is not entitled, but that he himself is; and this question the Government, by its accredited officers, will settle, or can, as is sometimes done, refer the conflicting claimants to the courts of the country to



settle their right, and issue the patent to the party who shall appear to be entitled. But we have seen no decision, and we apprehend none can be found, where a patent has been held void, when issued in accordance with the laws of congress, merely because some other person was in possession of the land granted claiming adversely to the grantee. We concede, that the grantee would be chargeable with notice of all the right and title which the party in possession may have to the land; and we may further concede, that if he relied upon a conveyance from the reservee, or an intermediate purchaser, made pending such adverse possession, his conveyance would be unavailing to maintain his action by reason of such adverse possession. But when he sets up a title or patent directly from the Government, as against which there can be no adverse possession, issued in accordance with the laws of congress, it cannot be thus avoided. The intermediate conveyances are then placed out of the way, as the useless scaffolding when the building is completed, and the party may rely upon the patent without producing them.

The decision of the circuit judge being opposed to the conclusion we have attained, the judgment must be reversed, and the cause remanded.

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### HEYDENFELDT vs. TOWNS ET AL.

[BILL IN EQUITY BY CREDITOR AGAINST DECEASED DEBTOR'S FRAUDULENT GRANTEE.]

1. *Decree ascertaining claim against insolvent estate prima facie evidence against intestate's fraudulent grantee.*—Conceding that a judgment against the personal representative, rendered according to the course of the common law, is not evidence against the heir or devisee, so as to charge the decedent's lands; yet, under the statutes of this State in reference to insolvent estates, the action of the orphans' or probate court, in ascertaining the amount of the decedent's indebtedness, binds the real estate equally with the personality, and, if not conclusive, is at least *prima facie* evidence against all parties interested in the estate, and against a fraudulent grantee of the decedent.
2. *Validity of judicial proceedings had before interested judge.*—The general rule, that it is irregular and improper for a judge to try any cause in which he

## Heydenfeldt v. Towns et al.

has such an interest as would disqualify him as a witness, does not apply to orders purely formal in their character, and it is doubtful whether it extends to a case in which no other judge could try and determine the cause. If the judge is deprived of authority to act by statutory inhibition, the proceedings are void ; otherwise, voidable only, and therefore valid until avoided.

3. *Construction of statute requiring appointment of commissioners, when judge of county court is interested, to make settlements with executors.*—The act of 1833 (Aikin's Digest, p. 253, § 41), which requires the appointment of commissioners by a judge of the supreme or circuit court, to make settlements with executors, &c., when the judge of the county court is interested in the estate, does not apply to the auditing of claims against an insolvent estate ; and therefore, if the claims are audited by commissioners appointed by a county-court judge who is a creditor of the estate, their proceedings are voidable only, and not absolutely void.\*
4. *Report of insolvency, when apparent from recitals of record, and in collateral proceeding, unnecessary.*—Although the proceedings of the orphans' court in the settlement of an insolvent estate, when the record does not show a report of insolvency by the personal representative, are liable to be reversed on error ; yet, in a collateral proceeding, (as where a creditor, whose claim is allowed against the estate, comes into equity against the decedent's fraudulent grantee,) the recitals of the record, showing that such a report was made, are sufficient.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Solomon Heydenfeldt, the appellant, against William Towns and the heirs-at-law of Benjamin Young, deceased, and alleged, in substance, these facts : That said Benjamin Young, at the time of his death, in July, 1841, was justly indebted to complainant in a large amount ; that letters of administration were granted on his estate, in November, 1841, by the Orphans' Court of Tallapoosa county, in which county he resided at the time of his death, to one John R. Slaughter ; that said administrator reported his estate insolvent, in February, 1842, and thereupon said court duly declared it insolvent, and appointed three commissioners, in pursuance of the statute, to audit and examine the claims of creditors : that complainant's claim against said estate was duly presented to said commissioners, and was by them audited, examined, and allowed, to the amount of \$2,704 80 : and that at the October term, 1843, said commissioners returned their report to said court, and the same was received, confirmed, and ordered to be recorded :—wherefore complainant claims to be a judgment creditor of said Young, and ap-

pende as an exhibit to his bill a transcript of all the said proceedings of said Orphans' Court in reference to said Young's estate.

The bill further alleges, that said Young in his lifetime was seized and possessed of certain lands in said county, worth about \$6,000, on which executions against him were levied in June and July, 1841, by the coroner and United States marshal; that previously to these levies, Young had contracted to sell these lands to said William Towns, for about \$6,000, and certain writings had been executed between them; that Towns, on ascertaining the existence of judgments against Young, refused to complete the said purchase, and the contract was thereupon rescinded, and all the papers relative thereto destroyed; that afterwards, and about the time said lands were levied on, Young and Towns, combining and confederating together for the purpose of defrauding the creditors of the former, entered into an agreement to the following effect: That Towns should claim said lands when they were put up at public sale under said executions, pretending that he had previously bought them from Young, and should buy them in for the use and benefit of Young, who, on his part, was to repay to said Towns whatever sum he might have to advance on them. In pursuance of this fraudulent agreement, as the bill further alleges, when said lands were offered for sale under said executions, Towns gave public notice that he had previously purchased said lands from Young, and had paid for them, and that the purchaser would buy a lawsuit; by means of which fraudulent representations, other persons were deterred from bidding; and said Towns bought in the lands at about one-third of their real value, and received the deeds of the coroner and marshal. It is averred, also, that the money paid out by him on these purchases was afterwards repaid by Young.

The prayer of the bill is, that said lands may be subjected to the satisfaction of complainant's said judgment.

The transcript of the proceedings of said Orphans' Court, which is made an exhibit to the bill, shows these facts: The order appointing an administrator, made in November, 1841, is signed by S. Heydenfeldt as judge, as also the order appointing the commissioners; and the latter order is in these

words: "Upon reading the return of John R. Slaughter, administrator of Benjamin Young, it appears from evidence adduced to the court that the estate of Benjamin Young is insolvent; it is therefore ordered and decreed, that the estate of Benjamin Young be declared insolvent; and it is further ordered, that William Haydon, John Bostock, and Salmon Washburn be appointed commissioners to audit the claims against said estate within twelve months." The commissioners made their report, allowing (among others) a claim due S. Heydenfeldt for \$2,704 80, to the October term, 1843; which report was received, examined, and ordered to be recorded, by Leroy Gresham as judge of said court.

The defendant Towns answered the bill, denying all the allegations of fraud, insisting on the fairness and validity of his purchase at the coroner's sale, and requiring strict proof of all the allegations of the bill in reference to the proceedings of the said Orphans' Court in the settlement of said Young's estate; and as to these proceedings, he says, he is advised and believes that, as set forth in the exhibit to complainant's bill, "the same are insufficient to charge respondent in this suit, and have not the effect or character of a judgment at law," &c.

An admission of record appears in the transcript, purporting to be made at the November term, 1852, "that the complainant is the same person who, as judge of the Orphans' Court of Tallapoosa, made the orders which appear in the exhibit to complainant's bill relating to the estate of said Benjamin Young, deceased, and that he was the judge of said court when he made said orders." On final hearing, on pleadings and proof, the chancellor dismissed the bill; holding, on the authority of *Darrington v. Borland*, 3 Port. 39, that the judicial ascertainment of complainant's claim against Young's estate was no evidence of indebtedness as against the defendant in this suit, who occupied the position of an executor *de son tort*; and his decree is now assigned for error.

JAS. E. BELSER, with whom was N. HARRIS, for appellant:

1. The bill is designed to reach real estate fraudulently conveyed; and such a bill may be filed by one creditor alone, whose superior diligence entitles him to the benefit of the re-



covery.—Watts v. Gayle & Bower, 20 Ala. 823; Dargan v. Waring, 11 *ib.* 988.

2. The dismissal of the bill, on the ground assigned by the chancellor, cannot be sustained. The judicial ascertainment of the complainant's demand, before the commissioners appointed by the Orphans' Court, is evidence against Towns, and has the force and effect of a judgment, with a return of no property; the intestate's estate being insolvent.—Watts v. Gayle & Bower, 20 Ala. 825; Pharis v. Leachman, *ib.* 662; King v. Shackelford, 13 *ib.* 435; Densler v. Edwards, 5 *ib.* 36; Darrington v. Borland, 3 Port. 35; 8 Geo. R. 354; 2 Rand. 396; Aikin's Digest, pp. 151–3, §§ 1, 4, 7. The recital in the record, of the return or report of insolvency, is sufficient to give the court jurisdiction to treat the estate as insolvent.—McCartney v. Calhoun, 11 Ala. 119.

3. Even if it was averred and proved that complainant was the judge who appointed the commissioners, the judgment would not be void by reason of that fact. The statute (Aikin's Digest, pp. 252–3, §§ 37 to 44) contemplates final settlements made by the judge himself, and not accountings made by commissioners. Besides, the report of the commissioners was approved by another judge, who was a disinterested person.—King v. Shackelford, 13 Ala. 436; Jennings v. Jenkins, 9 *ib.* 289.

4. It does not appear from the pleadings that the complainant is the same person who, as judge, appointed the commissioners.—Desha v. Stewart, 6 Ala. 852. Nor does the defendant Towns set up that defence in his answer.—Bank of Georgia v. Coster's Executors, 24 Ala. The defendant is confined to the defences distinctly set up in his answer. Bailey v. Wilson, 1 Dev. & Bat. Eq. 188. The appointment, at most, is not a void act, but only voidable; and the defendant has taken no steps to avoid it.

5. If the commissioners had been duly appointed by a judge of the Circuit or Supreme Court, and the appointment duly entered on the minutes, the commissioners would have been, *quoad hoc*, the court.—Cawthorne v. Weissinger, 6 Ala. 714. But as this was not done, the jurisdiction of the cause remained in the court, and its action is not void.—King v. Shackelford, 13 Ala. 435.

6. If the action of the commissioners is void, the appointment of the administrator is also void, as well as every thing else done whilst Heydenfeldt was judge; and if this be true, no administrator could have been appointed whilst he was judge. If this were the law, there would be a failure of justice in many cases.

WHITE & PARSONS, and LEFTWICH, *contra*:

1. The only evidence of the intestate's indebtedness to complainant is, the report of the commissioners and its confirmation by the court. But the court had no jurisdiction of the estate as an insolvent estate, since the record does not show that it was ever reported insolvent; which, as against third persons, was necessary to give validity to the decree establishing the indebtedness set up in the bill.—*McCartney v. Calhoun*, 11 Ala. 110; *Vivian v. Lister*, 8 Port. 377; *Wyman v. Campbell*, 6 *ib.* 219; *Clark v. West*, 5 Ala.

2. But, admitting that the entry on the minutes of the court is evidence that the estate was reported insolvent, still the court had no jurisdiction; the judge being largely interested in the estate as a creditor, and therefore incompetent to make any order affecting it.—*State, ex rel. Claunch, v. Castleberry*, 23 Ala. 85; *Earl of Derby's case*, 12 Co. 114; *Between the Parishes of Great Charte and Kennington*, 2 Stra. 1173; *Wash. Ins. Co. v. Price*, 1 Hopk. Ch. R. 1; *Hawley v. Baldwin*, 19 Conn. 590; *Sigourney v. Sibley*, 21 Pick. 101; *Aik. Dig.* 253.

3. A court of limited and special jurisdiction must show affirmatively that it had jurisdiction, and its want of jurisdiction cannot be aided by any waiver of exceptions, or even by express consent.—*Fields v. Walker*, 23 Ala. 167; *Sigourney v. Sibley*, *supra*; *Mills v. Martin*, 19 Johns. 35; *Wise v. Withers*, 3 Cranch. 331; *Peacock v. Bell & Kendal*, 1 Saund. 75, mar. p.

4. A judgment or decree against the administrator of Young is not evidence against Towns, nor against Young's heirs.—*Crow v. Hudson*, 21 Ala. 562; *Darlington v. Borland*, 3 Port. 9; *St. John v. O'Connell*, 7 *ib.* 476; *Phil. Ev. (Cow. & Hill's Notes)*, pt. 2, vol. 3, note 568; 2 Yerg. 10.

5. Towns, being a purchaser under a prior judgment, is

substituted to the rights of the judgment creditor; and one claiming under a decree made since the rendition of the judgment, as against him, must prove his debt by evidence *aliunde*. Daniel v. Sorrells, 9 Ala. 447; 2 Stew. 488.

GOLDTHWAITE, J.—The bill was dismissed by the chancellor, on the ground, that the allowance of the claim of the plaintiff against the estate of Young, by the commissioners appointed by the judge of the Orphans' Court, and its confirmation by that court, was not evidence of his being a creditor, so as to allow him to pursue the lands of the intestate in the possession of a fraudulent vendee. It may be true, that a judgment rendered according to the course of proceedings of the common law, against the executor or administrator, is not evidence against the heir or devisee, so as to charge the lands of the decedent (Mason v. Peters, 1 Munf. 437; Osgood v. Manhattan Co., 3 Cowen, 612; Neal v. McCombs, 2 Yerg. 10); though the contrary was held by Judge Marshall in Garnett v. Macon, 2 Brock. 185–213. We can see good reasons why a judgment in *personam* only, against a party who does not represent the real estate, should be entitled to no weight against another person, for the purpose of charging lands which are devised or descend to him. But there is a material distinction between a case of that character, and the ascertainment of a demand against the representative of the estate in the regular course of administration; and under the authority of our statutes, in case of insolvent estates, the court has full power to act upon the real estate, as well as the personal property, and to ascertain the amount of indebtedness of the decedent with respect to its action on both. And when this is done, if not binding and conclusive on all parties interested in the estate, it is at least *prima facie* evidence against them.—Brazeal v. Brazeal, 9 Ala. 491.

If it would have this effect against the heir or devisee, is there any reason why it should not have the same operation as against a fraudulent vendee? Does his fraud invest him with higher rights? The object of the bill is, to reach property which could not be administered by the rightful representative.—Marler v. Marler, 6 Ala. 367; Watts v. Gayle, 20 Ala. 817. The party in possession stands in the position

of an *executor de son tort*; and as such, the same rules apply to him, as if he was the rightful representative, except so far as they are affected by the fraud. If, however, he was one of two rightful representatives, he would be in privity with the other executor, so as to make a judgment against the latter, although in another State, evidence against him (*Hill v. Tucker*, 13 How. 458); and, *a fortiori*, would it be so, when rendered against the estate in the same jurisdiction.—*Stacy v. Thrasher*, 6 How. S. C. R. 44, 59, 60.

It is urged, however, that the proceedings in relation to the claim of the appellant were void, for the reason, that the judge had no authority to appoint commissioners to audit the claims against the estate, in the distribution of which he was interested as a creditor; and for the additional reason, that the record of the Orphans' Court, which was before the chancellor in evidence, did not show the report of insolvency by the administrator.

In relation to the first objection. The general rule unquestionably is, that it is improper and irregular for a judge to try any cause, in which, under the law, he had an interest which would disqualify him as a witness.—*Dimes v. The Grand Junction Canal Company*, 16 Eng. L. & Eq. R. 63. But the rule, as it is founded upon the same principles which apply to witnesses, does not relate to orders purely formal in their character, (*Underhill v. Dennis*, 9 Paige, 202); and it is doubtful whether it would extend to a case where no other judge could try and determine the cause.—*Paddock v. Wells*, 2 Barb. Ch. 331. If the judge is by statutory inhibition deprived of authority to act, then the proceedings are void (*Claunch v. Castleberry*, 23 Ala. 85); but when there is no prohibition by law, the proceedings are voidable only, and are valid until avoided.—*Dimes v. The Grand Junction Canal Co.*, *supra*. Were it otherwise, the greatest inconvenience and difficulty would ensue, since, in most cases, the parties acting under the proceedings would be ignorant of the want of authority until the act was done. The case we have last referred to, is a clear and direct recognition of the rule, with the limitation we have expressed, and is entitled to the highest consideration; being the judgment of the House of Lords, consisting of the Lord Chancellor, Brougham, and Campbell,



assisted by the judges, after full discussion by eminent counsel, the case itself being one of great interest and importance. If we concede, therefore, what we consider somewhat doubtful, that the fact that the judge of the Orphans' Court was a creditor of the estate, would be such an interest as might disqualify him from the appointment of commissioners to audit the claims: still the order was not void, unless there was some statute, which deprived him of the power to act in the premises. We have been referred to the act of 1833 (Aik. Dig. 253, § 41), as we suppose, with this view; but we do not think it has anything to do with an order like the one we are considering. It does not apply to the auditing of accounts before commissioners, but only to settlements which the administrator is required to make with the judge.

As to the objection grounded on the want of the report of insolvency: We do not think it is tenable. It is true that we held, on error, in *Clarke v. West*, 5 Ala. 117, that the peculiar jurisdiction of the judge in relation to insolvent estates, depended upon the report of insolvency by the personal representative; and that if the record failed to disclose the report itself, the proceedings were irregular, and subject to reversal on error. But the opinion contains a very clear intimation that they would not necessarily be void, if it appeared, as it did in that case, from the recitals in the record, that such a report had been made. This is the case here, as the decree of insolvency rendered by the judge of the Orphans' Court, upon a fair construction of its terms, appears to be based upon a return of the administrator to that effect; and although the recital of this fact might not be sufficient to sustain the action of the court in this respect in a direct proceeding to reverse it, yet it is enough against any attempt to impeach it collaterally, where every presumption in its favor must be made.—*McCartney v. Calhoun*, 11 Ala. 110–119.

In relation to the merits of the case upon the main question, we say nothing, as they were not considered by the chancellor. We simply determine that he erred in dismissing the bill on the grounds we have noticed, leaving all other questions open for his determination.

The decree of the chancellor must be reversed, and the cause remanded, the appellees paying the costs of this court.

## FOGG &amp; VANDERSLICE vs. JOHNSTON.

[BILL IN EQUITY FOR DISSOLUTION OF PARTNERSHIP.]

1. *For what causes equity will dissolve partnership.*—A court of equity may decree the dissolution of a partnership during the term for which it was entered into, and declare it void *ab initio*, where there is fraud, imposition, misrepresentation, or oppression in the original agreement; and may also decree a dissolution for causes arising subsequently to its formation, founded upon the misconduct, fraud, or violation of duty by one partner, or on account of his inability or incapacity to perform his obligations, and to contribute his skill, labor, and diligence in the promotion and accomplishment of the objects of the partnership, or for the existence of an impracticability in the undertaking for which the partnership was formed.
2. *Dissolution decreed from time of abandonment of contract by injured party and notice thereof.*—Where it is shown that the partner asking a dissolution was deceived and misled by the misrepresentations of his co-partner as to his skill and capacity as a machinist and engineer, and but for these misrepresentations would not have entered into the partnership; and that the defendant, since the formation of the partnership, has been guilty of misconduct and violation of duty.—a dissolution may be decreed, if the complainant's equities so require, to date from the time of his abandonment of the contract and notice thereof given to the defendant.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

THIS bill was filed by William Johnston, the appellee, and alleged the following facts: That complainant, living in Dallas county, and owning a valuable tract of land in Mobile county on which he was desirous of erecting a steam saw-mill, and being totally unacquainted with mechanics and with that kind of business, was anxious to form a partnership for that purpose with some person who was skilled in machinery and fully competent to erect and carry on such a mill; that upon his wishes in this particular becoming known, Samuel Fogg, one of the defendants, made application to him to become interested with him in said business, representing himself to be an experienced and accomplished engineer and machinist, fully competent to erect said mill, to procure and select the necessary machinery, to make any alterations or repairs that might become necessary, and to superintend and conduct the said

mills when in operation ; that Fogg further represented to complainant, that he had learned the business of a practical machinist in England, and was comparatively a stranger in this country, and could therefore give no recommendations ; that complainant, being deceived and induced by these representations of Fogg's, consented to form a partnership with him for the erection and conducting of a steam saw-mill, and accordingly on the first of August, 1851, articles of partnership were entered into between them and one Jacob Vanderslice, the stipulations of which are as follows :

“ William Johnston agrees to furnish the capital to start said mill, clear of interest ; and said Fogg and Vanderslice agree to refund all the expenses to said Johnston, except one-third of the price of the engine. Said Johnston is to give said Vanderslice and Fogg the privilege of all the saw-logs for their service for said mill ; and after expenses are paid, then to be equal in the profits and losses. If any one of the three wishes to quit, he is not at liberty to sell without the consent of the other parties. It is agreed by the parties, that if two of the partners should decease, the whole shall be closed by sale, and a division made to the surviving legatees. If Jacob Vanderslice, or Samuel Fogg, should decease, a good hand is to be put in their place, at the expense or interest of said deceased share. The business to be carried on for a space not less than five years ; and if the partners still survive, business to go on as usual till all the timber is cut suitable for saw logs.”

The bill alleges, that these articles, through mistake, do not express the precise contract between the parties, and specifies several particulars in which they are incorrect ; but these are immaterial, as the case is here presented. It further alleges, that on the formation of this partnership, Fogg was sent to the northern cities to purchase the necessary machinery for the mill, Johnston paying his expenses ; that the machinery which he there purchased was entirely different from that which they had previously determined on, was much more costly, and not adapted to such a mill as they proposed to erect ; that when Fogg returned, and the erection of the mill was commenced, complainant soon became satisfied that he had been grossly deceived by Fogg in his representations as



to his skill and capacity as a machinist and engineer ; that he displayed perfect ignorance of the most common operations of the machinery, and was utterly incompetent to superintend it ; that in consequence of this ignorance and incapacity on the part of Fogg, complainant has been compelled to expend large sums of money on said mill, which would otherwise have been unnecessary, and which greatly exceed the amount contemplated by the parties, and thus one of the objects of the partnership has entirely failed and become impracticable ; that Fogg has been wasteful and extravagant in the expenditures of the firm, and has contracted large outstanding debts in the name of the firm, which, as Fogg is insolvent and Vanderslice has but little means, complainant will be compelled to pay : that he refuses to let complainant have access to the books of the firm, and will not give him any information about the state of the business, &c.

The prayer of the bill is, for a dissolution of the partnership, an account of partnership transactions, an injunction, and for general relief ; and further, that complainant may be permitted, on giving good security, to take charge of the mill and work it until final hearing, or that a receiver may be appointed for that purpose.

Fogg answered the bill, denying all the allegations of fraud, misrepresentation, or deceit on his part, in the formation of the partnership, and of his subsequent neglect, inattention, or other misconduct in the management of the business of the mill ; and giving the following account of the formation of the partnership, and of his statements to complainant at that time : " Some time in the month of April, 1851, respondent was at complainant's residence in Dallas county, and while there was employed by complainant to repair a clock. During the time of his stay, he had a long conversation with complainant on the subject of manufactures, in which complainant seemed to be much interested, and respondent entered fully into an explanation of those in which he had been personally engaged as superintendent. On complainant's invitation, respondent remained over one night at his house ; and on the following day, complainant informed him that he owned a tract of land in the county of Mobile, which was remarkably well-timbered, and proposed that they should erect a saw-mill



upon it ; that he could furnish the necessary means, and that respondent should superintend its construction and management ; and that they should share as partners in the profits of the business, after he had been reimbursed for his outlay. This seemed to be a good arrangement, and respondent accepted the offer." After examining the lands in person, respondent returned to complainant's house, for the purpose of completing their arrangements preparatory to starting north for the machinery. Complainant then informed him, that since he himself was getting old, and respondent was a stranger to him, he had concluded to associate Jacob Vanderslice with them; and this arrangement was finally consummated. " Respondent denies that he solicited the formation of the partnership, and alleges that the proposition originated with complainant as above stated. He denies that he ever made such statements as to his knowledge and capacity, or that he was an experienced and accomplished engineer, as asserted in complainant's bill. The amount of their conversation upon this head was, that respondent had superintended in some manufactures, and had been two weeks at a saw-mill, running the engine ; that he was acquainted with the theory of the engine, and felt himself competent to put up and superintend the machinery ; but respondent made no pretensions to being a machinist, or that by education or experience he was entitled to such a position as complainant alleges he claimed for himself." He denies all the allegations of misconduct on his part in the purchase of the machinery, the erection of the mill, and its conduct and superintendence ; and alleges that the operations of the mill were conducted without any disturbance or difficulty for two or three months, when a difficulty arose between them having no connection with their business relations, and thereupon complainant took away from the mill his hands and oxen. and respondent was thus compelled to employ others to carry on the business.

A supplemental bill was afterwards filed, alleging that complainant, since the filing of the original bill, had purchased Vanderslice's interest in the mill. A great many witnesses were examined by both parties : the complainant's witnesses testifying to the facts, that Fogg was a clock maker or repairer by trade, that he knew nothing about machinery,

that he was incompetent to erect or superintend a mill, and that he had been guilty of particular acts showing great carelessness and recklessness in running the mill; and the defendant's, on the contrary, tending to prove that the mill was properly built and worked, that Fogg was industrious, economical, and competent to manage the business, and that the difficulty between him and Johnston originated in a private affair in nowise connected with their business. The witnesses on both sides, however, agree that the state of feeling between the parties is such that the partnership can no longer be carried on profitably, if at all.

The chancellor rendered a decree, on final hearing, dissolving the partnership, as of and from the 23d June, 1852, but delivered no written opinion: and his decree is now assigned for error.

E. S. DARGAN and R. H. SMITH assigned errors for the appellants, but submitted the case without argument.

F. S. BLOUNT and P. HAMILTON, *contra*.

RICE, J.—Where there is fraud, imposition, misrepresentation or oppression, in the original agreement for the partnership, a court of equity has jurisdiction to decree its dissolution, during the term for which it was originally entered into, and to declare it void *ab initio*. A court of equity may, also, decree a dissolution of the partnership, for causes arising subsequently to the formation of the contract, founded upon the misconduct, or fraud, or violation of duty, of one partner; or on account of the inability, or incapacity of one partner to perform his obligations and duties, and to contribute his skill, labor, and diligence in the promotion and accomplishment of the objects of the partnership; or for the existence of an impracticability in carrying on the undertaking for which the partnership was formed.—Story on Part., §§ 6, and 285 to 291; Collyer on Part., §§ 119, 296, 297, 360, and notes.

These principles are decisive of this case. It appears to our satisfaction, that Johnston was misled and deceived by the misrepresentations of Fogg, as to his skill and capacity as a machinist and engineer, and that but for these misrepresentations, Johnston would not have entered into the partner-

ship; and that since the partnership was formed, Fogg has been guilty of misconduct and violation of his duty; and that, as against him, there existed just cause for dissolving the partnership before and on the 23d June, 1852, if not for declaring it void *ab initio*.

As applicable to such a case as the present, we sanction the principle, that a court of equity, in decreeing a dissolution of a partnership, may fix the date of the dissolution at the time of the abandonment by the aggrieved party and notice thereof given by him, if the equities of that party so require.—*Durbin v. Barber*, 14 Ohio R. 311.

We say nothing as to Vanderslice, because, during the pendency of the suit, he sold and transferred to complainant all his rights and interests in the partnership and its property, as appears by the supplemental bill and proof; and this appeal is not taken or prosecuted by him. This is Fogg's appeal, and there is nothing in the decree of which Fogg can justly complain.

Decree affirmed, at the costs of Fogg and his surety.

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## DELOACH vs. THE STATE BANK.

[TRESPASS TO TRY TITLES TO LAND BY PURCHASER AT SHERIFF'S SALE.]

1. *Fi. fa. on void delivery bond amendable*.—A *fi. fa.* issued on a void delivery bond, against the defendants in the judgment and their surety on the bond, if it correctly describes the judgment, by its date, amount, and names of parties, is neither void nor voidable as to the defendants in the judgment, but may be amended by striking out the name of their surety on the bond.
2. *Sheriff's sale void for uncertain description of land*.—A sale under execution of two hundred and forty acres of land, out of a tract containing two hundred and eighty acres in a single body, when there is no description or other means of distinguishing the portion levied on and sold from the residue of the tract, is void for uncertainty and indefiniteness of description.

APPEAL from the Circuit Court of Choctaw.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by the appellee against James M. Deloach, to recover the south-east quarter and the south-east quarter of the north-east quarter of section twenty-eight, the north-east quarter of the north-west quarter and the north-west quarter of the north-east quarter of section thirty-three, in township fifteen, range two west; both parties deriving title under purchases at sheriff's sales under execution against West Neal.

The plaintiff's judgment was rendered at the July term, 1841, of the County Court of Tuskaloosa, against Robert Hill, Richard J. Painter, and West Neal, for \$466 debt, \$78 47 damages, and costs; and the costs taxed in the first execution were \$6 93 $\frac{3}{4}$ , making a total of \$551 40 $\frac{3}{4}$ . On this judgment an execution was issued on the 20th August, 1841, returnable on the first Monday in February, 1842; on which the sheriff of Sumter made the following return: "Levied 22d December, 1841, and bond taken for the delivery of the property on first Monday in January, 1842." The delivery bond, as set out in the record, is in the penalty of \$738 64; and the condition recites an execution against "Robert Hill and West Neal for \$568 32, including debt, damages, and costs, bearing test the 26th day of July, 1841, which was levied on a negro woman Nell, as the property of the said West Neal"; and then stipulates, "that if the said Hill and Neal shall deliver said property." &c. This bond is signed by Robert Hill, West Neal, and Jesse Hill; and on it is endorsed the word "forfeited", but without date or signature. On this bond, as forfeited, the clerk issued an execution on the 10th January, 1842, which, as he certifies, was never returned, and is not on file in his office; and afterwards several other executions were issued, which may be thus described: An *alias*, on the 6th May, 1842, against Robert Hill, Richard J. Painter, West Neal, and Jesse Hill, describing the judgment correctly: a *pluries*, on the 11th July, 1842, against the same parties; and an *alias pluries*, on the 8th May, 1843, against the same parties, and describing the judgment correctly. This last execution was returned by M. E. Gary, as sheriff of Sumter county, "Levied the 12th July, 1843", on certain lands, which are particularly described, as the property of Robert Hill; "*also, two hundred and forty acres of Neal's*



*property, numbers not known."* Afterwards, on the 10th August, 1843, a *venditioni exponas* was issued for the sale of these lands, describing Neal's lands as "*two hundred and forty acres of land as the property of West Neal, numbers not known.*" Under this process, said M. E. Gary, whose official term of office expired on the 18th August, 1843, sold said lands on the first Monday in September next thereafter ; and the plaintiff became the purchaser of Neal's lands, at \$3 60, and received the sheriff's deed for the same, in which they are described as "*two hundred and forty acres of land, as the property of West Neal, numbers not known, being the tract of land on which said Neal now resides, lying and being in the county of Sumter and State aforesaid, and in the Demopolis land district.*"

"Plaintiff also introduced copies of patents from the United States to said West Neal, for the north half of the south-east quarter of section twenty-eight, and of the south-east quarter of the north-east quarter of said section, in township fifteen, range two west ; also, copies of other patents to one Robert M. Williams, for said south-east quarter of section twenty-eight, and the north-west quarter of the north-east quarter of section thirty-three, in the same township and range ; and then proved that, on the death of said Williams, a partition of said lands was had between said West Neal and Mary Williams, in which the two last above-mentioned parcels of lands passed to said West Neal ; all of which patents and proceedings were of a date several years before said sheriff's sale. Plaintiff then introduced the deposition of said Mary Williams, to whom, by the said partition, among other parcels of land, was allotted the north-east quarter of the north-west quarter of said section thirty-three." In this deposition, the witness testifies, that in December, 1839, she sold said north-east quarter of the north-west quarter of section thirty-three to West Neal, and that in August, 1842, she executed to said Neal a power of attorney, authorizing him to sell her other lands in Sumter county : and she appends to her deposition copies of both these papers. "This deed," as the bill of exceptions states, "was not recorded, nor was the original produced ; but a predicate was laid for the introduction of the secondary evidence."

"In reference to the possession of the land, the proof was,

that West Neal, at the time of said sale by the sheriff, and for some years before, had a house and had been residing with his family on the south-east quarter of section twenty-eight, and had two fields of about eighteen acres together on the tract,—one of twelve acres on the said south-east quarter, and another of six acres in the swamp; that the rest of the tract was woodland, unfenced and lying out, but claimed and conceded by the neighbors to be the property of Neal. Whether the tract so claimed by Neal, and which was composed of the aforesaid parcels of land, or a part of them, contained two hundred and forty acres or two hundred and eighty acres, two of the witnesses said they did not know, and the others did not testify about; but they knew of no other land in the county belonging to West Neal, or claimed by him as his. There was further evidence, by one Coleman, who was a deputy sheriff in the fall and winter of 1843, that when the execution in favor of Walker, for the use of Jarrell, against said West Neal, under which the defendant claimed title, was in his (Coleman's) hands as such deputy sheriff, Jarrell, who was one of said Neal's neighbors, gave him the numbers of Neal's lands, correcting in part the erroneous numbers by which the sheriff had described said lands in his first endorsement of a levy on said writ; and that Jarrell said, in the same conversation, 'he knew this land had been sold by the sheriff under the Bank executions, and had been purchased by the Bank, but that it was worth enough to pay both the Bank and him, and his only chance to get his money was to work his execution in upon the same land, and if it came to the worst the land was worth both debts.'

"The defendant derived title, as to two hundred and forty acres of the land sued for, from one Reynolds, who purchased at the sheriff's sale under the execution in favor of Walker, for the use of Jarrell, against West Neal; and as to the other forty acres, being the north-east quarter of the north-west quarter of said section thirty-three, his title was a deed, dated January 9, 1847, executed by said West Neal, as agent and attorney in fact of said Mary Williams, under the power of attorney mentioned in her deposition; this being the same tract which she had sold to said Neal in 1839. Further notice of his title is unnecessary.

“The court charged the jury, among other things, that the sheriff’s sale to the Bank, in 1843, was not void because of uncertainty and indefiniteness of the description in the levy and deed; and stated, that if West Neal, the defendant in the execution, at the time of levy and sale, had title to and resided upon a tract containing as much as two hundred and eighty acres, rather than hold the sale void because of the uncertainty as to what portion of the tract the two hundred and forty acres mentioned in the levy and deed were to apply, it would be held that the sale conveyed the whole tract. But this charge the court modified, at the suggestion of the plaintiff’s counsel, in this wise, and gave instead thereof the following: That the court could not pronounce the sheriff’s sale and deed to be void for indefiniteness of description; but if the jury found from the evidence that Neal, at the time of the levy and sale, had a good title to and resided upon a tract of land in the county containing about two hundred and forty acres, and generally known as his, and it was not known that he had any other lands, then the sheriff’s sale and deed would convey such two hundred and forty acre tract.

“The court further charged the jury, that plaintiff conceded it had no right to recover that portion of the land mentioned in the declaration which had been conveyed to the defendant by Neal, as attorney for Mary Williams; and consequently, as to that portion, they must find for the defendant.”

To each of these charges the defendant excepted, and then asked the court to give several charges, of which the fourth was in these words: “4. That if the jury believe that Neal owned two hundred and eighty acres in a body, then they cannot tell which two hundred and forty were sold; and if so, they cannot find anything.” The court refused to give this charge, and the defendant excepted to the refusal.

The charges given, and the refusal to charge as requested, are now assigned for error.

R. H. SMITH and THOS. H. HERNDON, for appellant:

Since the plaintiff below derived title to the land under a sheriff’s sale, it was necessary for it to show a judgment, execution thereon, levy, and sheriff’s deed, each connected with and identifying the other.—Ware v. Bradford, 2 Ala. 682.

1. The execution, under which the land in controversy was sold, issued on a pretended forthcoming bond, which, it is contended, could not support an execution. The authority given to a clerk to issue an execution on a forfeited forthcoming bond, is a statutory power in derogation of the common law, and the requisitions of the statute must be strictly complied with. The party to be affected thereby has no day in court, nor will a writ of error lie to reverse the *quasi* judgment thus arbitrarily obtained. Where the bond does not identify the execution upon which it purports to be founded, the execution is void, and a sale under it confers no title.—Lunsford v. Richardson & O'Neal, 5 Ala. 618; Nicolson v. Burke, 15 *ib.* 353; 11 *ib.* 618; 7 *ib.* 593; 3 *ib.* 484; 1 *ib.* 317; 11 Humph. 189; 5 Dana, 278; 4 Dev. & Bat. 420; 5 Texas, 290; Watson on Sheriffs, 212.

2. But, if the bond had been good and valid, still no execution could have issued upon it, because it was not returned as required by statute. There was no endorsement at all on the execution, and the word "forfeited" only, without the sheriff's signature, on the bond.—Watson on Sheriffs, 69; Minor's R. 15; 1 Stew. 10.

3. The levy was too uncertain and indefinite to pass any title under the sale by the sheriff, and he could not validate it by a superadded description in his deed.—Borden v. Smith, 3 Dev. & Bat. 37; Huggins v. Ketchum, 4 *ib.* 414; 7 Blackf. 199; Fenwick v. Floyd's Lessee, 1 Har. & G. 171; 4 McLean, 329; Jackson v. Rosevelt, 13 Johns. 97; Jackson v. De Laney, *ib.* 536; 11 Barb. 172; 10 Humph. 44; 3 *ib.* 629; 2 Caines, 66; 3 Yerg. 171, 338; 8 Missouri R. 197; 10 Geo. 74; 11 Ired. 375; 2 Greenl. Cruise, p. 48, § 35.

A. R. MANNING, *contra*, made the following points:—

1. The delivery bond was sufficiently identified with the judgment and execution. It was offered in evidence as a part of the record of the case, and no motion was made to suppress it. Its dates exactly correspond with the dates in the sheriff's return; and the amount of the judgment, including the sheriff's commissions, makes, within a fraction of one dollar, the amount stated in the bond as that of the execution, "including debt, damages, and costs." As the parties to that case



never moved to quash the bond, execution, or sheriff's deed, as not pertaining to it, can a stranger be heard to make the objection in this collateral way?—*Fournier v. Curry*, 4 Ala. 321.

2. But the judgment, and not the bond, is the foundation of the plaintiff's title; and, even if the bond be void, the execution may be amended by striking out the name of the surety. *Sheppard v. Melloy*, 12 Ala. 561; *Campbell v. Spence*, 4 *ib.* 543; *Cawthorn v. Knight*, 11 *ib.* 579; *McCollum v. Hubbert*, 13 *ib.* 282; *Thompson v. King*, 15 *ib.* 341; *Andress v. Roberts*, 18 *ib.* 338; *Chambers v. Stone*, 9 *ib.* 260.

3. It is not essential that the sheriff should endorse on the execution a particular description of the land levied on, or even that he had levied at all.—*Forrest & Lyon v. Camp*, 16 Ala. 647-8; *Love v. Powell*, 5 *ib.* 58; *Driver v. Spence*, 1 *ib.* 540. A purchaser at execution sale cannot be affected by any irregularities of the sheriff, either in not giving the notice required, or in the return made on the execution.—Same authorities. The return is generally, and indeed necessarily, brief; and the description in the *vend. ex.* cannot be more extended than the return. The officer who made the levy knows what property he levied on, and is expected to describe it more at length in the advertisement, proclamation at the time of sale, and deed to the purchaser; and hence it is that deficiencies in the endorsement of the levy may be supplied and corrected by the sheriff's deed.—*Hopping v. Burnam*, 2 *Greene's (Iowa) R.* 39; *Helms v. Alexander*, 10 *Humph.*; *Webb v. Bumpass*, 9 *Port.* 203. If the defendant in execution is in danger of injury, he can avoid it by motion to the court, either before or after the sale; but if he acquiesces in the sale, certainly it cannot be set aside upon collateral impeachment by a stranger.

4. That the description of the land in the sheriff's deed is sufficient, is not controverted. "The tract of land on which said Neal now resides" could be as easily identified and proved by evidence outside of the deed, as the lands of the estate of Mt. Vernon, if the owner should sell them by that designation.—*Randolph v. Carlton*, 8 Ala. 606; *Webb v. Bumpass*, 9 *Port.* 201; *Jackson v. Jackson*, 13 *Ired.* 159.

CHILTON, C. J.—It may be conceded, in this case, that

the delivery bond, on which the execution purports to have issued, is utterly void, and that the execution, so far as it depends on it for validity, is of no force; and yet the concession avails the appellant nothing, for the reason, that the execution is amendable. It sets forth the true amounts of judgment, damages and cost, and the parties to the same, as well as the date of the rendition of said judgment; and commands the officer to levy these sums of property of the defendants, all of whom are properly named, except the surety upon the bond, whose name may be stricken out. Being thus specific, it may well be amended, and rest upon the judgment, although the bond be cast aside.—*Cawthorn v. Knight*, 11 Ala. 572; *McCullum v. Hubbert*, 13 *ib.* 282. Although a wrong name is introduced upon the face of the execution, this should not vitiate the process, as to the parties against whom it should and does properly issue. It would be erroneous to quash it for such defect.—*Sheppard v. Melloy*, 12 Ala. 561; *Thompson v. King*, 15 *ib.* 341. We conclude, therefore, that the execution, purporting to be issued as well against the surety on the delivery bond as against the defendants to the judgment, is, as to West, whose land was levied on, and who was one of the judgment debtors, neither void nor voidable, but valid and effectual, conferring upon the sheriff full power to make the levy.

The view which we take of this case renders it unnecessary for us to discuss the validity of the levy as endorsed upon the process. The proof clearly conduced to show that, at the time of the levy and sale, the tract of land owned by West Neal, and on which he then resided, embraced two hundred and eighty acres. Two hundred and forty of these were levied upon and sold; but no data are furnished, either by the deed or the parol proof, by which it may be determined what land was sold. The quantity to be taken from the tract is given; but out of what part of the tract it is to be taken, it is impossible to determine. This uncertainty could not be remedied by the subsequent sale of forty acres by Neal, as the agent of Miss Williams; nor by the concession made by the plaintiff's counsel, that the forty acre tract thus sold was not sought to be recovered. We must look to the tract as it existed when sold. It then belonged to Neal,—lay in one body, and con-

sisted, as we have said, of two hundred and eighty acres; so that the question of uncertainty as to the land sold still recurs.

The rule, which forbids the sheriff to sell any land which the creditor cannot enable him to designate with reasonable certainty, meets our entire approbation. It is required as well to prevent the sacrifice of real estate, by enabling bidders to know what they are buying, as to prevent frauds and speculation in such sales.—*Jackson v. De Lancy*, 13 Johns. R. 536. The fourth charge which was asked by the counsel for the defendant below, and refused by the court, distinctly presented the question, whether a sale by the sheriff of two hundred and forty acres, out of a tract of two hundred and eighty acres, and which afforded no means of distinguishing the land sold from the portion not sold, could be supported. The charge was, “that if the jury believed that Neal owned two hundred and eighty acres in a body, they could not tell which two hundred and forty acres were sold; and if so, they should not find anything.” Applying this charge to the evidence, we think it was correct, and should have been given.

As this point must reverse the case, and will probably be decisive of it upon another trial, we deem it unnecessary to notice the other questions raised by the assignment of errors.

Judgment reversed, and cause remanded.

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## HARRISON & ROBINSON vs. JOHNSTON.

[ACTION ON PROMISSORY NOTE—APPLICATION OF PAYMENTS.]

1. *Application by law of payment on running account.*—When there is a running account between debtor and creditor, a general payment, in the absence of any application by the parties, and where the character of the dealings or other circumstances do not show a different intention, will be applied by law to the charges in the order of time in which they accrued, without reference to the fact that one item may be better secured than another; since the particular parts, being blended together in one common account, have no longer any separate existence, and the balance only is considered as due.

## Harrison &amp; Robinson v. Johnston.

2. *This rule applied against debtor's surety.*—The foregoing rule applies in this case, where the defendant became surety for the debtor on a note given to his commission merchant, with whom he had a running account for advances made, cotton sold, &c., on which the note was credited when received, and debited when due; an account current being rendered to the debtor after the maturity of the note, showing a balance against him larger than the amount of the note, and the subsequent payments being credited on general account.
3. *Payment referred to existing debt.*—In the absence of evidence showing most unmistakably the intention of the parties, a general payment to a commission merchant, with whom the debtor has a running account, will be referred to his existing indebtedness, and not to future advances.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. EDMUND W. PETTUS.

THIS action was brought by the appellants, as partners, to recover the amount of two promissory notes, executed by Nathaniel G. Friend and John C. Johnston; each for \$2,500, dated April 4, 1852, and payable respectively nine and ten months after date, to Harrison & Robinson, or order, at the Bank of Mobile. The defendant (Johnston, who alone was sued) pleaded, "1st, that there was no good and sufficient consideration for said note to make it binding on him; and, 2d, that said note was paid by N. G. Friend, his principal."

The defendant filed interrogatories to the plaintiffs, and read their answers in evidence on the trial; and read in evidence, also, the deposition of one J. F. Loudon, who was plaintiffs' bookkeeper, from October, 1852, until November, 1853. The plaintiffs read in evidence another deposition of said Loudon, taken in their behalf, and the deposition of one Wm. K. Thurber. The material facts of the case, as proved by these witnesses, may be thus stated:

The plaintiffs were the factors and commission merchants of said N. G. Friend in 1850, and from that time until his death, which occurred after July, 1853, and kept a running account with him; but they had no business transactions with said Johnston, except in receiving notes from said Friend which were signed by Johnston as surety. On the 10th June, 1851, they received a note from said Friend, with Johnston's name signed as co-maker, for \$5,000, due March 1, 1852; which note was credited on Friend's account when received, and charged against him when due, but was not given up to



him until December 23, 1852. The notes here sued on were received from Friend on the 29th April, 1852, and were passed to his credit on the plaintiffs' books as cash, less the interest; being held as bills receivable, and charged against him at maturity. The witness Louden testifies, that "the reason why the notes are credited as well as charged, is to enable them to draw that much money—it operates as an advance of that much, being but a fictitious credit"; while Thurber says, "the effect of this was to give Friend a *bona fide* credit to that extent." If the account had been stated at the time these notes were received, and a balance then struck, Friend would have been found indebted to plaintiffs in the sum of \$394 99; and on the 16th January, 1853, the balance against him, not including the notes, would have been \$1,560 91. An account was stated and rendered to Friend on the 2d April, 1853, in which the notes were credited and debited as above stated, and which showed a balance against him at that time of \$5,750 23. This balance was carried forward, constituting the first item of a new account, which was thus continued:

"Doct. N. G. Friend in account with Harrison & Robinson.

1853.	Dr.	
Apl. 2.	To balance, as pr. account rendered, due us in cash.	\$5750 23
" 8.	" invoice goods, pr. Ambassador.	36 03
" 26.	" acceptance yr. dft. favr. J. G. Friend, due May 21-24, '54.	1075 00
" "	" commissions accepting do.	26 88
June 11.	" acceptance yr. dft. favr. self, due March 1-4, '54.	1200 00
" "	" commissions accepting do.	30 00
July 22.	" acceptance dft. favr. J. G. Friend, due Jan. 1-4, '54.	2500 00
" "	" commissions accepting do.	62 00

On the 6th June, 1853, Friend made a payment of \$2,882 67, and on the 9th of the same month another of \$2,680; and these payments, he having given no direction as to their application, were passed to his credit, in general account, as of those dates.

As collateral security for their acceptance of the draft for \$1075, stated in the above account, the plaintiffs took from John G. Friend a bill of sale of three negroes, with a defeasance, conditioned that they would return the negroes if said N. G. Friend furnished them with funds to meet said acceptance. The bill of exceptions states, that two of these negroes "were found by the defendant, on the plantation of said N. G. Friend in Greene county, in the fall of 1853, and

were taken by him, as administrator of said Friend, and sold ; and that the other was also levied on by the sheriff of Greene county, and sold by him, to satisfy certain executions then in his hands against said Friend”.

Upon this evidence, the court charged the jury, substantially, that if plaintiffs were the commission merchants of said Friend, and as such kept a general running account with him, and entered the notes on both sides of his account as above stated, and rendered an account to him on the 2d April, 1853, showing a balance against him of \$5,750, and that Friend afterwards made said payments of \$2,882 and \$2,680, without directing their application,—then plaintiffs had a right to make the application of them ; “and that if they failed to make any application of said payments, but entered them generally to the credit of said Friend on the general account current, which included these notes, then the jury must apply said payments, first, to the aforesaid balance rendered by plaintiffs to said Friend, and plaintiffs were entitled to recover the difference between the amount of said balance (\$5,750 23) and the amount of said payments, after making an accurate computation of interest on each of said amounts.”

Plaintiffs excepted to this charge, and asked the following charges :—

“1. That if the jury believe from the evidence that there was more than \$5,000 due from said Friend to plaintiffs when said notes were given, viz., on the 29th April, 1852, they must find a verdict for the plaintiffs, for the amount of the notes and interest.

“2. That if they believed from the evidence that there was due \$5,000 from said Friend to plaintiffs when said notes matured, they must find a verdict for plaintiffs, for the amount of said notes and interest.

“3. That if they believed from the evidence that there was due to plaintiffs from said Friend, on the 2d April, 1853, the sum of \$5,750 23, they must find a verdict for plaintiffs, for the amount of said notes and interest.

“4. That if they believed from the evidence that said payments of \$2,680 and \$2,882 67, made on the 6th and 9th June, 1853, or either of them, were made on account of plaintiffs' acceptance of Friend's draft for \$1,075 on the 26th April,

1853, and the subsequent acceptance of \$1200 on June 11, 1853, and of \$2,500 on July 23, 1853; and that the three negroes named in said bill of sale were given up by plaintiffs, and were sold by defendant (as administrator of said Friend) and the sheriff,—then they must find for the plaintiffs, for the amount of said notes and interest.

“5. That if they believed all the evidence, they must find for the plaintiffs, for the amount of said notes and interest.”

The court refused each of these charges, and to each refusal the plaintiffs excepted; and they now assign for error the charge given, with the refusals to charge as requested.

WM. P. WEBB; for the appellants:

I. The charge given by the court is erroneous, because,—

1. It assumes that the entry of the two notes, first on the credit, and then on the debit side of the account, and carrying them into the balance rendered, consolidates the two notes with the account, so as to constitute but one debt; whereas, there were two distinct debts. If the entry was so made, plaintiffs would not be bound thereby, nor would defendant be discharged from his liability on the notes.—American Leading Cases, Notes by Hare & Wallace, vol. 1, p. 290, and cases there cited.

2. It conflicts with the principle, that where a creditor holds two claims, one an open account, and the other secured by bond or note, and a general payment is made, which is not applied by either the debtor or the creditor, the court will instruct the jury to apply it to the account.—1 American L. C. (by H. & W.) pp. 286–96.

3. It assumes that the notes, having been entered on both sides of the account, were by that act changed into a mere item of debit and credit on the account current, and stood on no higher ground than any other item of account, or balance struck; while the evidence shows, that the credit, given when the notes were received, operated as a *bona fide* credit and cash advancement to Friend; and the effect of the debit and credit was, to leave the account just as though no entry of the notes had been made. Have the notes been paid by the entry, when they are still held by the plaintiffs, and were not given up when the account was rendered? or has the entry changed

the character of the debt, from notes with security, into an open account?

4. The rule adopted by the court, in the charge given, applies only to the case of an open account current, "the items of which do not form distinct debts", and not to such a case as this, where the items do form distinct debts—viz., one from Friend and Johnston on the notes, and the other from Friend on the account; and the rule does not apply to this case, for the further reason, that a different intention is to be inferred from the course of dealing between the parties.—1 American L. C. (by H. & W.) pp. 299, 300, and cases there cited; *Dulles v. DeForest*, 19 Conn. 191, 204.

5. The charge erroneously assumes that the account rendered to Friend on the 2d April, 1853, was a settlement with him; while the evidence shows that it was merely intended as a "memorandum statement." But, even if it was an account stated, and balance struck, the defendant was bound for that balance, to the extent of the notes; and the subsequent payments were on a new account, and on different security. The court, therefore, should have directed the credits of the 6th and 9th June to be applied, first, to the extinguishment of the items of the account current included in that balance, and to the subsequent debts of \$1075 and \$1200, before applying them to the notes sued on.—Authorities *supra*. If this action had been brought against Friend himself, he could not have insisted on the appropriation directed by the court, because he had incurred subsequent indebtedness, which swelled his entire debt to \$8,118 14; and, under the rule adopted by the court, the payments in June should have been applied to the reduction of this balance. If Friend himself could not have insisted on the application directed by the court, Johnston, as his surety, stood on no higher ground.

6. The defendant's liability on the notes was fixed when the notes matured, and not when the account was rendered in April afterwards; and the witness Loudon swears, that if Friend's account had been made up to January 16, 1853, the balance against him would have been about \$1,500, besides the notes, if they were not paid at maturity.

II. The court erred in refusing the fourth charge asked. The plaintiffs' answers to the interrogatories, and the receipt



attached to Loudon's deposition, show that the payments made in June were made and applied in consideration of Friend's draft for \$1075 and subsequent acceptances; and the court should have directed the jury to apply the payments according to the intention of the parties. The refusal of this charge invaded the province of the jury, by withdrawing from their consideration the evidence which tended to prove this intention.

III. The fifth charge asked should have been given.—Authorities cited *supra*.

JOHN T. LOMAX and S. F. HALE, *contra*:

The notes were not given for the previous indebtedness of Friend, except as to \$394 99, the amount due when they were delivered. They were given, as the witness says, for "*a fictitious credit*", on which Friend could obtain advances. They necessarily entered into the account current, as the advances which were made on them; and, consequently, were subject to the rules and principles governing mercantile accounts, which apply the payments to the oldest items in the account.

The principle established in *Mayor of Alexandria v. Patten*, 4 Cranch, 317, and in the analogous English and American cases collated in 1 American Leading Cases, 268, *et seq.*, to which plaintiffs' counsel refers, applies to cases where separate and independent debts are created at the time the credit is given, or the security taken; and, though there is some conflict in the decisions, we admit the weight of authority sustains the doctrine as expounded by Marshall, C. J., in that case. The able annotators, after reviewing these cases, on pages 298 and 300, distinctly lay down a different rule applicable to accounts current, and (with many cases) refer to the case of *United States v. Kirkpatrick*, 9 Wheat. 720-37. See, also, *Fairchild v. Holly*, 10 Conn. 175; *Dulles v. DeForest*, 19 *ib.* 191; *Upham v. Lafavour*, 11 Metc. 174; *Jones v. United States*, 7 Howard, 681; *Truscott v. King*, 2 Selden's R. 147. And the testimony and accounts are persuasive (if not conclusive) that the plaintiffs adopted and acted on this rule in regard to the note for \$5,000 credited on the 10th of June, 1851, and which was delivered up when the items credited exceeded the debits secured by the note, from and after that date.

The plaintiffs are estopped by the account as rendered. The amended account produced on the trial, by which they seek to evade this rule, was not made out till after issue in the cause, and the defendant's testimony had been taken. *Bank of North America v. Meredith*, 2 Wash. C. C. R. 47; *Seymour v. Morrison*, 11 Barb. 81; *Millikin v. Tufts*, 31 Maine, 497; 9 Wheat. 737; 10 Conn. 184; 1 Am. L. Cases, 289 and 290. On the rendition of the account, the balance stated becomes a consolidated debt, which the creditor cannot vary, to the prejudice of a surety.

In no case (in the absence of an express agreement), whether for separate and distinct debts, or in accounts current, can payments be withheld to be applied to debts subsequently due.—1 Am. L. C. 275–287; *Laws v. Sutherland*, 5 Gratt. 357; *Bacon v. Brown*, 1 Bibb, 334. And for these last items in the account, the plaintiffs had independent security, which they voluntarily relinquished.—1 Ala. 23; 22 *ib.* 575.

The charge asked for was improper. There was no evidence tending to show that any positive direction was given as to either of the items credited after 2d of April, 1853. The court, by the terms of this charge, was required to deny the defendant the benefit of both sums, if either had been specially applied to other items.

GOLDTHWAITE, J.—The case upon the record stands thus : The appellants were the factors and commission merchants of N. G. Friend, and there was a current account kept up between them, from April, 1850, until the death of Friend, which was subsequent to July, 1853. On the 29th of April, 1852, if the accounts had been made out and the balance struck, Friend would have been indebted about \$400 ; and on that day, he made two notes, each for \$2,500, payable at nine and ten months, with the appellee, Johnston, as surety ; which he delivered to the appellants, who passed them to his credit on their books, and held them as bills receivable, and charged them against him in general account when they became due. An account was made up against Friend, on the 2d April, 1853, consisting of many debits and credits, in which the notes were thus charged and credited ; and the balance which ap-

## Harrison &amp; Robinson v. Johnston.

pears to be due from Friend at that date was \$5,750, which balance was carried forward, and the account continued to 22d July, 1853, up to which time he was charged with the following additional items :

“ Doct. N. G. Friend in account with Harrison & Robinson.

1853.	Dr.	
Apl. 2.	To balance, as pr. account rendered, due us in cash,	\$5750 23
“ 8.	“ invoice goods, pr. Ambassador.	36 03
“ 26.	“ acceptance yr. dft. favr. J. G. Friend, due May 21-24, '54,	1075 00
“ “	“ commissions accepting do.	26 88
June 11.	“ acceptance yr. dft. favr. self, due March 1-4, '54,	1200 00
“ “	“ commissions accepting do.	30 00
July 22.	“ acceptance dft. favr. J. G. Friend, due Jan. 1-4, '54,	2500 00
“ “	“ commissions accepting do.	62 00

On the 6th June, 1853, Friend made a payment of \$2,882 67, and on the 9th June of the same year another of \$2,680, giving no direction as to the application; and these payments were passed to his credit in general account, as of those dates. Suit is brought against Johnston on the notes, and the question is as to the application of these payments.

If we concede the rule, as contended for by the counsel for the appellants, that when a partial payment is made, by one owing distinct and separate debts, the law, if called upon to make the application, will apply the payment to the debt which is the least secured, or most precarious; still this principle does not apply in the case presented by the record before us. The evidence here shows, that the appellants were the factors and commission merchants of Friend, and that there was a running account between them; and in that case, a different principle applies, and there, in the absence of any application of the payments by the parties, the law applies them to the charges in the order of time in which they accrue, without reference to the fact that one item may be better secured than another.—Clayton's case, 1 Mer. 608; Bodenham v. Purchas, 2 B. & A. 39; Brooke v. Enderby, 2 Brod. & Bing. 70; Story's Eq. § 459 g. It does this, on the principle, that such an appropriation is most consonant to the intention of the parties. Where the factor, from time to time, makes advances, receives payments, and blends the debts and the credits together in one common account, then the parts have no longer any separate existence, but it is the balance only

which is considered as due.—*Per* Bayley, J., in *Bodenham v. Purchas*, *supra*.

Suppose the firm of Harrison & Robinson, in which there were three partners, had been owing Friend, on the 2d April, \$5,000, and on that day one of them went out of the concern, and Friend subsequently drew on the new firm, who continued the business for \$3,000; then they sold cotton belonging to him, for \$2,000, and he then drew upon them for \$2,000; keeping a running account, and charging up the balance due from the old firm against the new, and the other items of debit and credit on general account:—would he be allowed, on the failure of the new firm, to say, ‘I will hold the retiring partner of the old firm responsible for the balance of \$2,000 which is unpaid’? and would the law aid him to do so, by holding that the payments made by the new firm should be applied to the transaction on which the other partner was not responsible, because it was the most precarious debt. This is the precise case put by Sir William Grant in *Clayton’s case*, and, in principle, it is identical with the one under consideration.

We would not be understood to say, that the rule is inflexible, or that it extends to cases in which the different transactions between two parties are made to assume the form of an account, when in reality the items of which it is made up are such as to repel any inference that there was intended to be any account running; or where the character of the dealings is such as to show that it was not the intention of the parties that the payments should be thus applied. If a different application is expressly shown, or is to be inferred from the particular course of dealing, or from the particular circumstances of the case, the rule would not apply.—*Taylor v. Kymer*, 3 B. & A. 320, 333; *Capen v. Olden*, 5 Met. 268 272; *Dulles v. DeForest*, 19 Conn. 191, 204.

Here, however, the record discloses no evidence which would warrant the inference that a different application was to be made. There is an account opened with Friend by the appellants, who are his factors. Contemplating advances to be made by them, he passes to them the notes sued on for their security. They make advances, sell his cotton, charging the notes, as well as the advances made upon the faith of



them, and credit him with the notes and other payments made. The whole is blended together, and a balance struck against Friend as the result of all the transactions; the account is rendered to him, and the balance carried forward to a new account, of which it forms the first item. Under these circumstances, upon principle as well as authority, the payments being charged to general account by the creditor, without making any other appropriation, he should be held to the election he has thus made and manifested, and the payments be applied to the balance due, as rendered in the account of 2d April, which is the first item of the new account.

For the same reasons, the three first charges, as well as the last, requested, were correctly refused. There was no error in the refusal to give the fourth charge, for the reason that the payments made in June could not, in the absence of evidence showing most unmistakably the intention of the parties, be referred to debts which had not even an existence at that time.—*Gass v. Stinson*, 3 Sumn. R. 99; *Pattison v. Hull*, 9 Cowen, 765, 773, 777.

Judgment affirmed.

## WEATHERS vs. SPEARS.

[BILL IN EQUITY BY JUDGMENT DEBTOR TO REDEEM LANDS SOLD UNDER EXECUTION.]

1. *What interest passes by decree of redemption.*—Under the statute (Clay's Digest, p. 502, § 1) which authorizes a judgment debtor, whose lands have been sold under execution, "to redeem the interest that may have been sold", it is error to decree that the purchaser convey the land by quit-claim deed, since he may have acquired some other interest than that which passed at the sale.
2. *Liability of purchaser for rents and profits.*—Rents and profits, accruing before a tender and refusal, may be set off against improvements made; but if they exceed the value of the improvements, the purchaser is not liable for the excess: he is liable only for rents and profits accruing after the tender.
3. *Entitled to what interest.*—The purchaser is entitled, on decree of redemption, to ten per cent. interest on his purchase money until the tender and refusal, and to eight per cent. afterwards.

APPEAL from the Chancery Court of Randolph.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by William Spears to redeem certain lands which were sold under execution against him, and were purchased by the appellant. The judgment, on which the execution issued, was rendered on the 7th November, 1844, for \$100 debt, and \$18 21 costs; and the lands were sold on the first Monday in February, 1845, and were purchased by the appellant, who was the plaintiff in the judgment, for \$32 12½. A tender was made of the amount required by the statute, on the 28th January, 1847, but the defendant refused to reconvey. The cause was submitted for final decree, on pleadings and proof, at the August term, 1853; when the chancellor rendered a decree, holding that the complainant was entitled to the relief sought, and ordering a reference to the master to state an account. Under this reference the master reported, at the August term, 1854, "that the sum due the defendant for the amount bid by him at the sheriff's sale, at the rate of ten per cent. per annum, from February, 1845, to January 28, 1847, is \$12; that from the date of the sale to the 28th January, 1847, the defendant made valuable and needful improvements, by clearing, fencing, &c., worth \$25, and since that time, by clearing three acres of land, worth \$9; and that the value of the rents and profits, from the date of the sale to said 28th January, 1847, is \$40 90, and since that time \$255." This report was confirmed at the same term, and a final decree was rendered, in which it was ordered, adjudged, and decreed, that defendant convey to complainant, before the first day of January next thereafter, by quit-claim deed, the lands in controversy; and further, "it appearing to the court that the rents of the land exceed the amount of the purchase money and improvements, by the sum of \$242 60, it is ordered, adjudged, and decreed, that defendant pay to complainant said sum of \$242 60, for which execution may issue."

From this decree the defendant now appeals, and here assigns the same for error.

C. D. HUDSON, for appellant.

JAS. W. GUINN, *contra*.

RICE, J.—There is, at least, one palpable error in the decree of the chancellor. It consists in adjudging, that the defendant convey "*the land*" described in the decree to the complainant by quit-claim deed. The statute authorizes the judgment debtor to redeem only "*the interest that may have been sold*" at the execution sale.—Clay's Dig. 502, § 1. The court ought not to have gone beyond the statute. It may be that the defendant owns some *other interest* than "the interest" which he acquired at the execution sale. If he does, the chancellor had no authority, under the present bill, to deprive him of it. But the decree, as it now stands, would have the effect to deprive him of it; because the deed, which the decree requires him to execute, will, when executed, deprive him not only of "*the interest*" which he acquired at the execution sale, but of *all other interest* which he may own in the land at the execution of the deed.

As the decree must be reversed, and the cause remanded, for the error above noticed, we take occasion to say, that we cannot see why the chancellor, upon the report of the master, should have decreed that the defendant pay to the complainant \$242 60, unless the chancellor supposed it right either to refuse to allow defendant lawful interest on his purchase money from and after the tender and refusal, or to hold him liable for the excess of the rents and profits which accrued *before the tender and refusal*, over the improvements made. If the chancellor entertained either of these suppositions, he was in error. The rents and profits, which accrued *before the tender and refusal*, may be set off against the improvements made; but if they exceed the value of the improvements, the defendant is not liable for such excess. He is liable, in such case, only for the rents and profits accruing *after the tender and refusal*.—*Spoor v. Phillips*, at the present term. And he is entitled to a credit or allowance for his purchase money, and ten per cent. interest thereon *until the tender and refusal*, and to eight per cent. interest on the purchase money from the day of the tender and refusal.

The decree is reversed, and the cause remanded, for further proceedings not inconsistent with this opinion.

## MARTIN vs. HARDESTY.

[ACTION UNDER CODE TO RECOVER DAMAGES FOR MALICIOUS PROSECUTION.]

1. *Evidence of plaintiff's general bad character admissible.*—In an action to recover damages for a malicious prosecution for larceny, the defendant may introduce evidence of the plaintiff's general bad character, showing that his only occupation was that of gambling and horse-racing; since it would require less stringent proof to make out probable cause for prosecuting a man of such character, than one who had always maintained a good reputation and followed a lawful occupation.
2. *Admissibility of declarations of ownership, when accompanied with possession, and when referring to past transactions.*—Declarations of ownership of a slave, when accompanied with possession, are admissible evidence as a part of the *res gestæ*; but declarations referring to a past transaction are mere hearsay, and therefore inadmissible.
3. *General objection to evidence, of which part is legal.*—A general objection to evidence as a whole, when a part of it is legal, may be overruled.
4. *Hearsay inadmissible.*—A witness, who saw two persons engaged in writing, cannot testify to the character of the writing from what one of the parties afterwards told him respecting it: such evidence, relating to a past transaction of which the conversation formed no part, is mere hearsay.
5. *Malicious prosecution.*—The cases of *Leaird v. Davis*, 17 Ala. 27, *Long v. Rogers*, *ib.* 540. same parties. 19 *ib.* 321. *Ewing v. Sanford*. *ib.* 605, and 21 *ib.* 157, cited and approved.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. ANDREW B. MOORE.

THIS action was brought by George C. Hardesty against Levi Martin, to recover damages for a malicious arrest and imprisonment on a charge of larceny, and was commenced in February, 1853. The only plea was, not guilty. It appeared from the evidence that Hardesty was arrested in Mobile, in January, 1853. on a charge of having stolen a slave named Jane, preferred against him by the defendant in this action, and was imprisoned for several days in the city guard-house; that he claimed to have received the slave from one Oran Martin (a brother of said Levi), who gave him a power of attorney to carry her to Mobile and sell her. The defendant introduced evidence, tending to show that he had purchased said slave from Oran Martin, in July, 1852; that pos-



session was to be given up to him on the first of January, 1853 ; that Hardesty, at the time he carried away the slave, held defendant's notes for the purchase money, claiming them as his own, and knew that defendant claimed her, and heard defendant tell Oran Martin, on the 1st January, 1853, to send her home to him. The plaintiff, on the other hand, introduced evidence tending to show that this sale was fraudulent.

A great many exceptions were reserved to the rulings of the court on the evidence ; but it is only deemed necessary to notice those which are reviewed by this court.

The defendant offered in evidence the deposition of said Oran Martin, who was asked, among other questions, "Do you know the general reputation of the plaintiff in the neighborhood where he lived in the last of the year 1852 ? Was his reputation good or bad" ? Witness answered, that he did know plaintiff's general reputation ; that his reputation was bad ; that he lived at his house, and gambled and horse-raced a little, and had no further occupation." The plaintiff objected to this question and answer, and moved to suppress them ; which motion was sustained by the court, the evidence suppressed, and defendant excepted. "At the time this testimony was offered," as the bill of exceptions states, "the plaintiff disclaimed, in the presence and hearing of the court and jury, all right to recover anything on account of any damage to his character."

"The plaintiff introduced one Henry Chambers as a witness, who testified, that Oran Martin, while in possession of the negro Jane, told him that said negro belonged to him, that he had employed Hardesty to carry her to Mobile and sell her for him, and that he had given Hardesty a power of attorney for that purpose. The defendant objected to these declarations of Oran Martin, made to witness when defendant was not present, and moved to exclude them ; but the court overruled the objection and motion, and the defendant excepted."

The plaintiff introduced one Kennedy as a witness, who testified, that Hardesty and Oran Martin stayed all night at his house when the former was on his way to Mobile with the slave ; that they got up before day, and asked him for pen, ink,

and paper ; that they wrote something, but he could not tell what was written ; that he did not see or read the writing. The plaintiff then asked witness, what Hardesty and Martin said they wished to write, or what they said they had written ; and witness answered, that they said they were writing a power of attorney, but did not say for what purpose. To this question and answer the defendant objected, but the court overruled his objection, and he excepted. The plaintiff then asked witness, whether or not Oran Martin had afterwards told him what the paper was which they were writing at his house ; and the witness answered, that Oran Martin returned to his house, a short time after he and Hardesty had left, and told witness, that the paper which Hardesty wrote was a power of attorney from him to Hardesty to sell the slave Jane, and that he (Martin) had signed it. To this question and answer the defendant objected, and moved to exclude the same from the jury ; but the court overruled his objection, and defendant excepted.

These rulings of the court, with other immaterial matters, are now assigned for error.

J. R. JOHN and WM. M. BROOKS, for appellant.

I. W. GARROTT, *contra*.

CHILTON, C. J.—We are of opinion that the court erred in excluding the evidence of the bad character of Hardesty from the jury ; and that his only occupation was that of gambling and horse-racing. It would certainly require less stringent proof to make out probable cause for prosecuting *such* a character for larceny, than one who maintained a good character, and followed an occupation for a livelihood altogether lawful.

The testimony of Chambers, “that Oran Martin told him, while in possession of the slave alleged to have been stolen, that said slave belonged to him, and that he had given Hardesty a power of attorney, and employed him to take her to Mobile and sell her”, &c., was, when taken in connection with the other proof, partly legal, and partly improper. It was proper to prove that, having the possession, he said he was the owner, as this was explanatory of the possession, showing

that he held the slave in his own right; but his declarations that he had employed Hardesty to sell the slave in Mobile, and had given him a power of attorney for that purpose, were improper, because they related to a past transaction,—were mere hearsay, and could not constitute part of the *res gestæ*. This is a familiar distinction, and recognized by numerous decisions of this court. The testimony, however, was objected to as a whole; and the rule in such case justifies the court in overruling such objection.—See 2 Ala. R. 280; 4 *ib.* 99; 13 *ib.* 587; 15 *ib.* 535; 20 *ib.* 392; 22 *ib.* 416; 23 *ib.* 335; *ib.* 659; 25 *ib.* 433.

It was also improper for the witness Kennedy to testify what Oran Martin told him as to the character of the writing he and Hardesty had entered into on a prior occasion at the house of the witness. This was not part of the *res*, and, relating to a past transaction of which the conversation formed no part, was hearsay merely, and improperly admitted.

The law which must govern such cases is fully laid down in the cases of *Leaird v. Davis*, 17 Ala. R. 27; *Long v. Rogers*, *ib.* 540; 19 *ib.* 321; *Ewing v. Sanford*, 19 *ib.* 605; 21 *ib.* 157. It is needless, therefore, to discuss the points attempted to be presented by the charges. As the other points presented will hardly again arise, we deem it unnecessary to decide them.

Judgment reversed, and cause remanded.

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### CAPLE ET AL. vs. MCCOLLUM.

[BILL IN EQUITY TO ESTABLISH RESULTING TRUST.]

1. *Uncertainty in immaterial allegations no ground of demurrer.*—Where the substantial allegations of the bill, if proved, would establish a resulting trust in favor of the complainant, independent of the agreement under which the money is alleged to have been paid, uncertainty in the terms of the alleged agreement is immaterial, and constitutes no ground of demurrer.
2. *Resulting trust established against purchaser at sheriff's sale in favor of defendant in execution.*—The evidence in this case showed these facts: Complainant's land

was sold under execution, and bought in by defendant at about one-sixth of its real value. At the time of the sale, defendant declared to several persons that he was buying in the land for complainant, and requested them not to bid for it; and after the sale, on several occasions, he declared that he had bought it in for complainant, and that complainant was to have it if he repaid the money by the next term of the court. Within a month after the sale, when defendant had paid nothing on the execution, complainant had an interview with him, went with him to the sheriff's office, and there counted out and paid, in his presence, the amount of his bid; which was thereupon credited on the execution: *Held*, that these facts made out a clear case of resulting trust.

5. *Statute of frauds does not apply to resulting trusts.*—The statute of frauds has no application to trusts created by operation of law alone, which may always be established by parol, except where some rule of evidence prevents it.

APPEAL from the Chancery Court of Fayette.

Heard before the Hon. E. D. TOWNES.

THIS bill was filed by James K. McCollum, the appellee, against Samuel Caple, George M. Hubbert, Raza H. Poe, and Samuel B. Abernathy, and contained, in substance, the following allegations: That certain judgments were rendered against complainant, in 1840, on which executions were issued and levied on his lands by defendant Hubbert, who was then sheriff of Fayette county; that Hubbert's term of office expired soon afterwards, and said executions were by him handed over to his successor, said Poe, who struck out the date and Hubbert's name, and inserted his own name and the date on which they came to his hands; that said lands were exposed to sale by said Poe, as sheriff, in October, 1840, and were bid off by said Samuel Caple for the sum of \$510, under the following agreement with complainant: "It was well known to said Caple that complainant was abundantly able to pay said judgments, independently of his aforesaid lands, which were worth at least \$5,000; and complainant had assured said Caple, that he would be able, in a few days, to raise the money necessary to pay the balance due on said executions, and that ill-health alone had prevented him from then being able to do so. In view of these considerations, said Caple agreed with complainant to bid off said lands for complainant's benefit, and to hold them simply in trust for him; that if said executions should be paid by complainant, without the necessity on the part of Caple of paying or ad-



vancing for him the amount bid, he would not even take a deed for the land, but would, if necessary, make such release of them to complainant as might be required to continue the title thereto in him ; also, that he would, in any event, act as complainant's friend in the premises, and reconvey or release said lands to him, upon a return of such amount as he might be required to pay of the sum to be bid for said lands."

The bill further alleges, that said Cagle, at the time of said execution sale, publicly declared that he was buying in said lands for complainant, under said agreement, and thereby prevented many persons from bidding, and the lands were knocked off to him at \$510 ; that within a few days after the said sale, and before Cagle had paid anything on his bid, complainant procured the money, called upon Cagle with it, declaring his readiness to pay the amount of his bid, and proceeded with him to the sheriff's office, where they found Poe and many other persons present ; that complainant then and there counted out \$510, and handed it to Cagle, who paid it over to said Poe, by whom it was credited on said executions, together with a further payment of \$200 then made by complainant ; that the entire amount due on said executions was paid by complainant, and no portion whatever was paid by Cagle ; that afterwards said Poe, confederating with said Cagle and Hubbert to defraud complainant of his said lands, and under an agreement to divide them among themselves, executed a deed, as sheriff, conveying said lands to said Cagle and Hubbert, who thereupon commenced an action of trespass to try titles for their recovery, and have succeeded in recovering a judgment against complainant ; that said Poe has transferred his interest in the lands to the defendant Abernathy. The prayer of the bill is, that said judgment at law may be enjoined, and that defendants may be decreed to hold said lands as trustees for complainant.

The defendants filed a joint answer, in which they deny the existence of any such agreement as charged in the bill, or of any agreement whatever, between complainant and said Cagle in reference to the purchase of said lands at the execution sale ; insist that the purchase was made in good faith, by Cagle and Hubbert jointly ; admit that Cagle, after the land had been knocked off to them, told complainant that he

might have it back, if he would pay the amount of the bid and the balance due on the judgment, on which Cagle was bound as surety, before the return day of the execution ; allege that complainant did not accept this proposition, and did not pay the balance due on said execution ; demur to the bill for want of equity ; and plead the statute of frauds.

It is unnecessary in this place to give an abstract of the evidence, the substance of which is stated in the opinion of the court. On final hearing, on bill, answer, and proof, the chancellor rendered a decree in favor of the complainant ; which is here assigned for error.

E. W. PECK, for the appellant, made these points :—

1. The demurrer to the bill should have been sustained, because of the uncertainty of the character of the alleged agreement. It cannot be determined from the allegations of the bill whether Cagle was to release or re-convey to the complainant on the payment of the executions, or upon the re-payment of the sum bid at the sheriff's sale.—Story's Eq. Pleadings, § 255.

2. The alleged agreement is void under the statute of frauds.—Denton v. McKenzie, 1 Dess. Eq. R. 289, 297 ; Agee v. Steele, 8 Ala. 948 ; Lamborn v. Watson, 6 Har. & John. 252 ; Lamborn v. Moore, *ib.* 422 ; Schmidt v. Gatewood, 2 Rich. Equity R. 162, 178 ; Bander v. Snyder, 5 Barb. 63.

3. The proof made by complainant may incline the court to believe that an agreement of some sort existed between him and Cagle ; but it cannot be determined from the evidence what that agreement was, or when it was made,—whether before or after the sheriff's sale. To entitle the complainant to a decree, he should have distinctly stated what the agreement was, and then proved it as stated. A variance, between the case made by the bill, and the proof, is fatal to his right to a decree.—Clements v. Kellogg, 1 Ala. 330 ; Goodwin v. Lyon, 4 Port. 297 ; Morgan v. Crabb, 3 *ib.* 470.

ORMOND & NICOLSON, *contra*, contended,—

1. That the defendants below, under the proof, were mere trustees for the complainant.—Roberts on Frauds, 97.

2. That the statute of frauds cannot be invoked by the defendants.—Jenkins v. Eldridge, 3 Story's R. 181; Andrews & Brothers v. Jones, 10 Ala. 420; Morris v. Nixon, 1 How. (U. S.) R. 118; 12 U. S. Digest, p. 316, § 16.

GOLDTHWAITE, J.—The first question presented on the record is, as to the action of the chancellor in overruling the demurrer to the bill; the object of which was, to declare a parol trust upon lands, and, as an incident to that relief, to enjoin a judgment at law, which had been rendered in favor of the trustees against the *cestui que trust*. The bill charges, that the land of the complainant having been levied on by execution, the defendant Caple, knowing his ability to pay the same, and that he had only been prevented from doing so by sickness, agreed as a friend to bid off the land, and hold it in trust for him,—that he would take no deed, if the complainant was able to pay off the executions before the amount bid should be required of him by the sheriff; and at all events, that he would re-convey to the complainant on the repayment of the amount bid by him. This part of the bill is selected for the operation of the demurrer; and it is urged in this court, that it is impossible to say from these charges whether the agreement on the part of Caple was, to re-convey on the payment of the executions, or on the repayment of the amount bid by him. We do not consider it necessary to determine this question, for the reason, that whether we consider it in the one aspect or the other is entirely immaterial, as the bill also charges that the money was not paid by Caple, but was paid by the complainant before any deed was made, and that the amount due on the executions was paid off by him. Under these circumstances, it would, in principle, be the case of land bought and paid for by one person, and the title taken to another; and a trust would then result to the person who paid the money.—Willis v. Willis, 2 Atk. 71; Bottsford v. Burr, 2 Johns. Ch. 405.

But independently of the facts to which we have referred, the equity of the bill is sustainable on other grounds. If the land was bid in by Caple, for the benefit of McCollum; or, whether it was or not; if before the former paid the amount bid, and took the deed, he received the money from McCollum

lum, and recognized it as the money which was to be applied in payment for the land, and it was paid to the sheriff with that understanding, then, as the payment was in fact made by McCollum, the trust would result to him, upon the principle to which we have already adverted. These facts are substantially charged by the bill, and, if made out by the evidence, would entitle the complainant to the relief asked, without reference to the other allegations. Because more is stated in the bill than may be necessary, will not prevent a party from obtaining relief.

Upon the evidence, we regard the case as a perfectly clear one. The land was sold on the 5th October, 1840. At the time of the sale, Caple declared, to more than one person, that he was buying the land for McCollum, and requested them not to bid; and after the sale, he declared, on several occasions, that he had made the purchase for McCollum, and that he was to have the land if he paid the money by court. The land was worth from three to four thousand dollars, and it was bid off by Caple at five hundred and ten dollars—scarcely one-sixth of its value. It is proved, too, that Caple had paid nothing up to the 27th of October; and that on that day, the complainant, after having a conference with Caple, went with him to the sheriff's office, and there, in his presence, counted out and paid to the sheriff the amount which Caple had bid for the land—five hundred and ten dollars—which was credited on the execution. If this payment was made in pursuance of an understanding between Caple and McCollum that it was to pay for the land bid off by the former, then the case is too plain for argument. The answers of the appellants, however, positively deny this, and assert that Caple objected to its being regarded or received as a payment for the land, and insisted that it should go as an independent payment on the execution; and that it was in fact so paid. We do not regard the answers of either Caple, Hubbert, or Poe, as entitled to any weight, for the reason, that the material facts stated by them are disproved by the evidence of several witnesses. It is, to say the least of it, singular, that if the objection was raised, not a single person of those present, who were not interested in the matter, has any recollection of it, and every one who was present and



has been examined in relation to what passed upon that occasion, states facts which are opposed to it ; and their evidence is corroborated and strengthened by the repeated admissions, subsequently made by both Caple and Hubbert, in effect, that the amount paid at that time was for the land. Indeed, Caple goes further than this, and announces his intention to swindle the appellee out of his land, making at the time a calculation of the profits which would result to him from the operation ; and Poe also admits that the claim, which he had been instrumental in setting up for the land, was an unjust one. True, there is some conflict of testimony ; and where the witnesses examined are as numerous as in the present case, it would be strange if there was not. But the main facts—that the land was bid off by Caple for the benefit of McCollum, and that the money of the latter paid for the purchase by him, are fully and clearly established. The testimony also establishes, that after the payment was made by McCollum, the appellants, Caple, Hubbert, and Poe, entered into a fraudulent combination, for the purpose of defrauding him out of his land. If they made the payment, which they allege in their answer, but which they have failed entirely to prove, it would place them in no better situation, as its object was to give color to a fraud.

In relation to the statute of frauds and perjuries, it is only necessary to observe, that it has no application to a trust arising by operation of law alone, which can always be established by parol, unless it is prevented by the rules of evidence ; as where it contradicts a written instrument.—Robert on Frauds, 99, 100; *Boyd v. McLean*, 1 Johns. Ch. R. 582; *Willis v. Willis*, 2 Atk. 71; *German v. Gabbald*, 3 Bin. 302.

The decree of the chancellor was correct, and must be affirmed at the costs of the appellants.

## WILLIAMS, ADM'R, &amp;C., vs. CRUM.

[TROVER FOR CONVERSION OF A SLAVE.]

1. *Bailee of widow, before administration granted on her husband's estate, not liable for value of property to administrator subsequently appointed.*—If a widow hires out a slave belonging to the estate of her deceased husband, before administration granted, and the bailee returns it at the expiration of the term, in as good condition as when he received it, he is not liable in trover to an administrator subsequently appointed for the value of the slave and interest.
2. *Measure of damages.*—The general rule in trover, that the measure of damages is the value of the property at the time of the conversion with interest thereon, was adopted to give the plaintiff a full indemnity for the injury sustained by the defendant's wrongful conversion of his property, and to prevent the defendant from deriving any benefit from his own wrongful act; but there are cases to which this rule has no just application, and in which the equity of the case is allowed to mitigate the damages.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was brought by the appellant, as administrator *de bonis non* of John J. Funchess, deceased, to recover damages for the conversion of a slave named Patience, belonging to the estate of his intestate, and was commenced in March, 1853. The defendant pleaded, 1st, not guilty; and, 2d, the statute of limitations of six years. The plaintiff took issue on the first plea, and replied to the second, "that plaintiff's intestate died in 1835, in possession of the slave sued for, that the conversion was in 1837, and that no administration was granted on his estate until the fall of 1852."

On the trial, as the bill of exceptions states, "the plaintiff proved that his intestate emigrated to this State from South Carolina, bringing the said slave with him; that he kept possession of her until his death, which occurred in the spring of the year 1835, in the county of Lowndes, and that he died intestate; that said defendant got possession of said slave, and worked her on his farm in the year 1837; that she was worth six or seven hundred dollars; that no administration was ever granted on the estate of said Funchess until 1852,

when the administrator in chief resigned, and plaintiff was appointed administrator *de bonis non*."

The defendant then offered in evidence the deposition of Mrs. Eleanor Smith, who was the widow of said Funchess, and who testified, that she hired said slave to the defendant, for fifty dollars, during the year 1837; that defendant was unwilling to take the slave, and only took her to oblige witness; that he returned the slave to her at the expiration of the year, and paid her the hire; and that the slave afterwards died in her possession, in 1839 or 1840. "The plaintiff objected to so much of the evidence of this witness as went to show that she received said slave from the defendant at the expiration of the year 1837, on the ground that it was neither a justification nor mitigation of defendant's conversion of the slave, she not being administratrix; but the court overruled the objection, and plaintiff excepted."

"The court charged the jury, that at the death of Funchess, his widow was entitled to the custody and safe-keeping of the property until administration granted; and if they found from the evidence that defendant hired and received the possession of the slave from Mrs. Funchess, after her husband's death, and restored her to Mrs. Funchess at the expiration of the year, and before administration, in as good condition as when she was received, and that the slave was not injured while in his possession,—then they cannot find against the defendant the value of the slave, but the plaintiff is entitled to a verdict for the injury done by the temporary conversion of the slave, with the interest on such sum up to the trial."

To this charge the plaintiff excepted, and asked the court to charge the jury, "that if defendant used and worked said slave in 1837, this was a conversion, and returning the slave to the widow at the end of that year would not excuse him, as she was not the administratrix nor the owner; and that the verdict should be the value of the slave, with interest from the time of the conversion". This charge the court refused, and the plaintiff excepted.

The charge given, and the refusal to charge as requested, are now assigned for error.

THOS. WILLIAMS, for the appellant, cited the following

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Williams, adm'r, &c., v. Crum.

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cases : Lawson's Adm'r v. Lay's Executor, 24 Ala. 184 ; Per-  
minter v. Kelly, 18 *ib.* 716; Lee v. Matthews, 10 *ib.* 682.

GEO. W. STONE, *contra*, cited Sharp v. Ne Smith, 6 Rich.  
31 ; Brown v. Beason, 24 Ala. 466 ; 1 Lomax on Ex'rs, 77.

RICE, J.—It is settled in this State, that a widow may maintain trover for personal property belonging to the estate of her deceased husband, of which she had possession several years after his death, when no letters of administration have been granted on his estate.—Brown v. Beason, 24 Ala. 466; Lowremore v. Berry, 19 *ib.* 130.

From this the necessary implication is, that the widow in such a case has a special property, which the law sanctions and protects. It also follows, that the widow of appellant's intestate could have maintained trover against Crum, if, after hiring the slave now in controversy from her in 1837, and after the expiration of the term of hire, he had refused to return the slave to her ; no administration on the estate having been granted until 1852. The same law which conferred this right upon her as against Crum, cannot be so inconsistent and unjust as to declare, that by becoming her mere bailee, and holding under her until the termination of the bailment, and then restoring to her the slave in as good condition as when received by him, he became liable in trover to an administrator in chief of her deceased husband, subsequently appointed, for the value of the slave and interest thereon. Ward v. Bevil, 10 Ala. R. 197; Schley v. Lyon, 6 Geo. R. 530; Harker v. Dement, 9 Gill's R. 7.

We admit that, in this State, the general rule is, that the measure of damages in trover is the value of the property at the time of the conversion and interest thereon. But this rule was adopted to effect the great object for which trover was designed. That object is, to give to the plaintiff a *full indemnity* for the injury sustained by the *wrongful conversion* of his property by the defendant, and to prevent the defendant from deriving any benefit from his own *wrongful act*. The rule can only be justly invoked, or applied, for the purpose of effecting that object. There are exceptions to the rule, and cases to which it has no just application. In ascer-



taining the damages in many actions of trover, it is allowable to mitigate them, by investigating and determining what (for want of a phrase of greater accuracy) is called the equity of the case.—*McGowen v. Young*, 2 Stew. & Por. 160; *Ewing v. Blount*, 20 Ala. R. 694; *Sharp v. Ne Smith*, 6 Rich. R. 31; *Schley v. Lyon*, 6 Geo. R. 530; *Pierce v. Benjamin*, 14 Pick. R. 356; *Hopple v. Higbee*, 3 Zabriskie's R. 342.

If any error has been committed in this case, it was not against the appellant. Judgment affirmed.

### WRAY'S ADM'RS *vs.* FURNISS.

[BILL IN EQUITY TO ENJOIN JUDGMENTS AT LAW ON NOTES GIVEN FOR PURCHASE MONEY OF LAND.]

1. *When vendee may enjoin judgment on account of vendor's insolvency.*—A vendee, with covenants of warranty, against whom a judgment is recovered on the notes given for the purchase money, and who is afterwards evicted from the land under title paramount, may enjoin the judgment in equity, when the estate of his vendor is insolvent, and the defence could not have been made at law.
2. *Notes executed on same day not necessarily parts of same transaction.*—Notes given for the purchase money of distinct tracts of land, but bearing date and executed on the same day, do not thereby become parts of the same transaction, nor so blended together that an eviction from one of the tracts will enable the vendee to enjoin the collection of the note given for the other.
3. *When demand for unliquidated damages against insolvent estate of assignor may be set off in equity against assignee.*—A demand for unliquidated damages, arising from a breach of covenant of title, may be set off in equity against a note founded on an independent consideration, when the vendor is dead and his estate insolvent; but to make it available as an equitable set-off against an assignee of the note, it must be shown to have accrued before notice of the assignment.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. WADE KEYES.

THIS bill was filed by Wm. H. Rives, and Sarah Jane, his wife, as administrator and administratrix of Philip A. Wray,

deceased, against Abram Martin, as administrator of Henry F. Slatter, deceased, and Henry Furniss. The original bill alleged, that on or about the 13th November, 1848, said Wray purchased from said Slatter four lots in the city of Montgomery, "known as lots number fifteen, sixteen, and seventeen on the south side of Washington street, and lot number nine on the east side of Lawrence street", at the price of \$3,500; that said Slatter on that day executed to Wray his deed for said lots, in which he covenanted that he was lawfully seized in fee simple, and that said lots were free from all incumbrances; that said Wray executed three notes for the purchase money, bearing date on 4th December, 1848, one for \$500, due January 1, 1850, one for \$1,000, due January 1, 1850, and one for \$2,000, due January 1, 1851; that Wray went into possession of said lots, under said purchase, and held them until his death, when they passed into the possession of his widow, the complainant Sarah Jane, who has since intermarried with said Wm. H. Rives; that said Slatter afterwards died in Montgomery county, his place of residence, and letters of administration on his estate were granted to Abram Martin, one of the defendants to the bill, on the 13th June, 1849, and he thereupon qualified and entered on the discharge of his duties; that said Martin, on the 12th January, 1850, reported said Slatter's estate insolvent, whereupon such proceedings were had that on the 5th March, 1850, said estate was declared and decreed insolvent by the Probate Court of Montgomery; that on the 2d April, 1850, said administrator (A. Martin) instituted a suit against said Wray on said notes for \$500 and \$1,000, each due January 1, 1850; that said Wray departed this life during the pendency of said suit, in Montgomery county, his place of residence, and letters of administration on his estate were granted to complainant Sarah Jane, on the 13th February, 1852; that said suit was afterwards revived by *scire facias* against said administratrix, and at the Fall term, 1853, a judgment was rendered against her for the amount of said notes and interest; "that said note for \$2,000, given as aforesaid by said Wray to said Slatter in part payment for said lots, has been transferred to one Henry Furniss, a citizen of the city and State of New York; that said Furniss has instituted suit on

said note against complainant Sarah Jane, as administratrix of said Wray, in the Circuit Court of Montgomery, and will recover a judgment at the next term of said court, unless enjoined."

The bill further alleged, that on the 29th October, 1850, during the lifetime of said Wray, the "Montgomery Hall Company", a chartered corporation, instituted an action of ejectment against him and others, in the Circuit Court of Montgomery, to recover the possession of said lots purchased by him from Slatter; that said suit was revived against his administrators after his death, and at the Fall term, 1853, a judgment was therein rendered in favor of the plaintiffs, and their damages assessed at \$2,178 20; that a writ of possession was afterwards issued on this judgment, under which the plaintiffs were put in possession of said lots by the sheriff; that said Slatter in his lifetime, and his administrator since his death, were notified of the pendency of said action of ejectment, and required to defend it; that said Slatter, in fact, at the time he sold and conveyed said lots to Wray, had no legal title to them, but the legal title was in said "Montgomery Hall Company". Complainants insist, therefore, that the covenants of title contained in said Slatter's deed have been broken, and that his estate, by reason of its insolvency, is unable to respond in damages; and they ask that said judgment and suit at law may be perpetually enjoined.

The defendant Furniss answered the bill, alleging that Wray executed four notes for the purchase money of the lots described in the bill—viz., one for \$1,000, due January 1, 1849, another for \$1,000, due June 1, 1849, another for \$1,000, due January 1, 1850, and another for \$500, due January 1, 1850, and not bearing interest till due; that the note for \$2,000, held by himself, "was executed for another and wholly distinct consideration, growing out of another and wholly distinct transaction, which had no connection whatever with the purchase of the lots mentioned in the bill", and which he describes as follows: "That said note was executed and delivered by said Wray to said Slatter, in part payment of certain other lots in the city of Montgomery—to-wit, lots number five west of Lawrence street, and number twelve, thirteen, fourteen, and forty-five feet off the east part of lot

number eleven, on the south side of Monroe street; which lots were purchased by said Wray from said Slatter, for the sum of \$4,000, for the payment of which sum of money said Wray executed and delivered to said Slatter his two promissory notes, for \$2,000 each, due and payable on the first day of January, 1851, and 1852, respectively"; and said note due January 1, 1851, is the note now held by respondent.

After this answer came in, the complainants filed an amended bill, in which they allege, "that on the 2d day of December, 1848, and about the time that said Wray purchased from said Slatter the lots described in their original bill, said Wray also purchased from said Slatter certain other lots in the city of Montgomery, known and designated as" (the same described in the defendant's answer); "that on said 2d December, 1848, said Slatter conveyed said lots last described, with covenants of warranty of title and freedom from all incumbrance; that the price, or consideration money, agreed to be paid by said Wray, for said last described lots, was \$4,000; that on or about the 4th December, 1848, said Wray executed to said Slatter six promissory notes, all bearing date December 4, 1848,—one for \$1,000, due January 1, 1849; one for \$1,000, due June 1, 1849; one for \$1,000, due January 1, 1850; one for \$500, due January 1, 1850; one for \$2,000, due January 1, 1851, with interest from date; and one for \$2,000, due January 1, 1852, with interest from date;—that all of said notes were given for the purchase money of all of said lots. Since the filing of their original bill in this case, complainants have been informed that the first four of the notes above described were given specially for the purchase money of the lots particularly described in their original bill, and they believe the information to be true, though they have no personal knowledge of the facts. But complainants show, that all of said six promissory notes were executed on the same day, and that if said first four notes were not given specially for said lots first described, all said six notes were given together, in payment for all said lots; that said note for \$2,000, now held by Furniss, was given in part payment of said several lots, and the notes on which (as alleged in their original bill) said Martin has recovered judgment, were either given specially in part pay-



ment of said lots described in said original bill, or were given generally in part payment for all said lots ; that all the other notes have been paid and satisfied. And complainants insist, that whether said notes were given generally or specially, as above shown, or upon any other consideration, they are in equity entitled to set off against them their claim for damages against Slatter's estate, on account of its insolvency ; and they pray that the debts may be thus set off.

The chancellor, on motion, dismissed the bill for want of equity as against Furniss ; and the complainants now appeal from his decree.

N. HARRIS, with whom were ELMORE & YANCEY, for the appellants :

1. The fact that complainants were in possession of the lots at the time the judgment in favor of Slatter's administrator was rendered, prevented them from defending the suit at law. *Chapman v. Glassell*, 13 Ala. 54; *Bliss v. Smith*, 1 *ib.* 273; *Clemens v. Loggins*, *ib.* 623; also, 4 *ib.* 421. As the defence could only be made in a court of equity, it was competent to make it after judgment at law.—*Nelson v. Dunn*, 15 Ala. 502; *Calloway v. McElroy*, 3 *ib.* 406. The complainants' right, therefore, to enjoin the judgment obtained by Slatter's administrator, is clear.

2. The question then arises, whether the complainants are entitled to relief against the note held by Furniss. Neither the original nor the amended bill shows that this note was assigned to Furniss before maturity, or that he paid value for it ; and the note itself, as appears from the exhibit, was not negotiable at any bank. Even if the note had been negotiable and payable at a bank, the complainants' equity would be available against Furniss, unless he showed that he purchased before maturity, and paid value for it.—*Thompson v. Armstrong*, 7 Ala. 256; *Marston v. Forward*, 5 *ib.* 347. If this note was given for the lots from which the complainants have been evicted, it is clear that they cannot be compelled to pay it, under the allegations of the bill. If it was given for all the lots generally, then all the notes, being given at the same time, constituted one transaction, and the failure of consideration may be urged against either of them. If it was given

upon any other consideration, the insolvency of Slatter's estate entitles the complainants to set off against it in equity the damages which they have sustained by the eviction from the other lots.—Tuscumbia, Courtland & Decatur Railroad Co. v. Rhodes, 8 Ala. 206; Hunter v. O'Neil, 12 *ib.* 40. Having this right of set-off, complainants are entitled to come into equity to enforce it, and Furniss is a proper (if not necessary) party defendant to the bill.—Story's Equity Pleadings, § 72; Blakey v. Blakey, 9 Ala. 394; Morgan v. Morgan, 3 Stew. 383; Smith v. Peters, 1 Stew. & P. 124.

HILLIARD & THORINGTON, *contra*:

Furniss is the holder of a note which has no connection whatever with the transaction out of which complainants' demand arises, but which was given for lots from which they have never been evicted, and of which they now hold peaceable possession. The bill does not allege that the six notes were given generally for all the lots; nor that the note held by Furniss was transferred to him after maturity; nor that it was transferred without consideration; nor that he had notice of any equity against it. On the contrary, the presumption is, that the note was transferred for valuable consideration, and before maturity; and against this presumption of law the bill alleges nothing. The principle, then, asserted by the bill, is, that the collection of a note, given for the purchase money of land of which the vendee has peaceable possession, and transferred before maturity and for valuable consideration to a stranger, will be enjoined in equity, merely because the vendor's estate, by reason of its insolvency, cannot respond in damages for a loss sustained by the vendee from another distinct transaction. Such a principle cannot be sustained by any authority whatever, nor is it supported by any of the cases cited by the appellants' counsel. The utmost latitude which can be given to the doctrine on which they seek to rest their case, is this:—If a chose in action, not assignable at law, be assigned, a claim against its original owner, although disconnected from it, coupled with the fact of his insolvency, constitutes an equity against the assignee; or, if the chose in action be assignable, and be assigned after maturity, or with notice of a claim against it, then also the

insolvency of the original owner constitutes an equity against the assignee ; but, where a chose in action, assignable at law, has been transferred for valuable consideration and without notice of a counter demand, then the equity must arise out of the same transaction, and the fact of insolvency is immaterial.

CHILTON, C. J.—The bill shows that the lots, to which there is a failure of title, constitute the consideration of the notes held by Martin as the personal representative of Slatter ; that he has obtained a judgment, and the amount will be collected out of the estate of Wray, unless enjoined ; that Slatter's estate is insolvent, and if it is allowed to collect the judgment, the estate of Wray must lose the demand existing against the estate of Slatter. It further shows, that the defence now insisted upon could not have been set up at law to prevent a recovery upon the notes. It may readily be conceded, then, that as to the demand which Slatter's administrator has, the jurisdiction of the court of equity, arising upon the face of the bill, is ample.

But this is not the question before us. Does the bill show an equity in favor of the complainants, as against Furniss, who is assignee of one of the notes executed on the same day with those on which the judgment in favor of Slatter's administrator was rendered, but given for lots to which there is no failure of title, and as to which the covenants in the deed, which are alleged to have been broken, have nothing to do ?

That the notes were given on the same day, does not, of itself, so connect them as to make them parts of the same transaction. The consideration was distinct, and does not become blended merely because the notes bear even date. The covenants in the deed from Slatter, alleged to have been broken, have no reference to, nor connection with, the lots for which the note held by Furniss was given, nor with the note itself, so as to enable the court to work out an equity in favor of the complainants as inherent in the transaction.

Does an equity exist, regarding them as distinct transactions ? The estate of Wray has an equity against the estate of Slatter, to the extent of the notes given for the lots to which there is a failure of title, and it has a demand against

said estate for the residue ; but as to this residue, it is but a cross demand, existing in the form of damages for a breach of the covenant contained in the deed. These damages are unliquidated, and could not, ordinarily, be the subject of set-off, either in a court of law or equity. But it is insisted in the case before us, that an equity attaches to have the set-off allowed by reason of the insolvency of Slatter's estate. This would certainly be a good ground for equitable interposition as against Slatter's estate ; " but, although the insolvency of one of the mutual debtors, *existing at the time of filing the bill*, would be a sufficient ground of equitable jurisdiction as between them, yet, where one of the mutual debts, existing in the form of a note, is assigned to a third person, it seems clear that the insolvency of the obligee, commencing after the obligor has notice of the assignment, can never attach as an equity against the note in the hands of the assignee, nor furnish in itself a ground for setting off against it the debt of the obligee to the obligor."—Wathen's Ex'r v. Chamberlain, 8 Dana, 164. The equitable right of set-off is given by the insolvency of Slatter's estate. But for this, so far as regards the demand held by Furniss, which is independent of the demand accruing upon the breach of the warranty, there would exist no equitable right of set-off. Now when did this equity accrue? The bill does not inform us, and in this it is fatally defective and void of equity. For we take the true rule to be, as asserted in the case above cited, and in Ridgway v. Collins, 3 Mar. 412, " that an equity against an obligee, to be made available against his assignee, must have existed before notice of the assignment." This seems to harmonize with the rule which applies at law as prescribed by the statute.—Clay's Digest, 381, § 6.

In the case of The Tuscumbia, Courtland and Decatur Railroad Co. v. Rhodes, 8 Ala. 206, the transfer only vested an equitable interest in the assignee, the subject-matter being an account ; and besides this, the company was insolvent when the assignment was made. The same may be said of Donaldson's Adm'r v. Posey, 13 Ala. 752, 770, where the contest was between two persons claiming equities, and we gave the preference to the older. The cases of Hunter v. O'Neil, 12 Ala. 37, Cullum v. Branch Bank at Mobile, 4 *ib.* 21, and



Long v. Brown, *ib.* 622, show that the complainants have an equity as against Slatter's administrator, but none of them apply to cases like the present, where the rights of an assignee are involved.

The bill merely states the assignment of the note by Slatter to Furniss, giving no date, and that the estate of Slatter was decreed insolvent by the Probate Court, on the 5th day of March, 1850. For aught that appears, the assignment and notice of it accrued long before the insolvency; and as it is incumbent upon every complainant to show by his bill a title to the relief which he seeks, and none is shown here, the bill, as to Furniss, was properly dismissed.

Decree affirmed.

## PERKINS vs. PERKINS.

[MOTION FOR RENDITION OF FINAL DECREE NUNC PRO TUNC.]

1. *Evidence held insufficient.*—An entry, made by a judge of probate on his trial docket, in these words, "Estate of Solomon Perkins, dec'd. Final settlement—Settlement made", in connection with memoranda endorsed on the executors' account current by one of the attorneys in the cause, showing the terms of the settlement, and the parol evidence of the judge that he had pronounced an oral decree in conformity with the memoranda, is insufficient to authorize the rendition of a final decree at a subsequent term *nunc pro tunc*.

APPEAL from the Court of Probate of Wilcox.

MOTION by Samuel F. Perkins, at the May term, 1853, for the rendition of a final decree against the executors of Solomon Perkins, deceased, *nunc pro tunc* as of the 14th April, 1851. The court granted the motion, and its action is now assigned for error.

A. P. BAGBY and JAS. E. BELSER, for appellant.

GOLDTHWAITE, J.—The rule as laid down in *Hudson v. Hudson*, 20 Ala. 364, is, that no judgment can be amended,

unless the amendment is authorized by matter of record, or by some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at least by some office book required to be kept by law. Here the amendment was predicated on an entry, made by the judge of the Probate Court on his trial docket, in these words :

“ESTATE OF SOLOMON PERKINS, deceased.

“Final settlement. Settlement made ;”

and the terms of the settlement were proved by memoranda endorsed on the account current, not made under the direction of the court, but by the attorney in the cause, and the evidence of the judge, to the effect that he pronounced an oral decree in conformity with these memoranda.

If we can hold this sufficient, there is no telling where we are to stop. If a judge can refresh his memory, by writings made by a third person, and prove the terms of his decree in that way, it is the same in principle, as allowing the terms of any judgment, verdict, or decree, to be established altogether by oral testimony ; and this would be a very dangerous precedent, and going much farther than any of our decisions warrant.

The decree must be reversed, and the cause remanded.

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## PARKER vs. MISE.

[ACTION UNDER CODE TO RECOVER DAMAGES FOR SHOOTING A DOG.]

1. *Injury to dog actionable.*—A dog is a species of property, for an injury to which an action at law may be maintained ; and it is not necessary to show that he had pecuniary value.
2. *Exemplary damages allowable for trespass on property.*—The law implies that some damage is sustained from every wrongful injury to property, although there may be in fact no sensible damage ; and if the trespass is accompanied by circumstances of aggravation, “smart money”, or exemplary damages, may be assessed by the jury, although the property itself had no pecuniary value.
3. *Opinion of witness inadmissible.*—A witness cannot be asked, “whether, from his knowledge of the dog, he did or did not consider him a nuisance.”

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

THIS action was brought by Burrell H. Mise against James Parker ; the complaint being in these words :

"The plaintiff claims of the defendant \$500, as damages for wrongfully shooting plaintiff's dog, said dog being the property of plaintiff, and of the value of \$50 ; and other wrongs done to the said plaintiff by the said defendant on the 31st December, 1853."

The defendant demurred to the complaint, "1st, for the reason that no sufficient cause of action against him is therein set forth ; and, 2d, because plaintiff alleges other wrongs in his declaration, without stating what those wrongs are." The court overruled the demurrer, and the defendant then pleaded not guilty and justification ; on which pleas issues were joined, and a trial had.

"On the trial," as the defendant's bill of exceptions states, "the defendant proved, by one Minter, that he had seen the dog in controversy frequently, in passing plaintiff's house ; that the dog would run out at him, in passing the house, and show a disposition to bite him or his horse ; that he would raise up his feet in order to prevent the dog from biting him ; and, further, that the dog never did bite his horse. The defendant asked said witness, whether, from his knowledge of said dog, he did or did not consider said dog a nuisance ; to which question the plaintiff objected, the court sustained the objection, and the defendant excepted.

"In order to show the viciousness of said dog, and that he was very dangerous, the defendant proved that he had bitten off the tails of two of *plaintiff's* (?) cows ; that said cows, at the time, were in plaintiff's field ; and that plaintiff had set his said dog on them. He then proposed to prove by a witness, that the fence around said field was about four-and-a-half feet high, and that the gap to the field was still lower ; to which the plaintiff objected, the court sustained the objection, and the defendant excepted. The defendant proved by five witnesses, who had frequently seen said dog, and when passing plaintiff's house said dog having run out at them, and would catch hold of the tails of their horses, that in their opinion,

founded on their knowledge of said dog, they did not consider him of any value as property; and one witness proved, that said dog, in his opinion, was not worth the powder and shot that killed him. On the other hand, plaintiff proved by two witnesses, who knew said dog well, and one of whom had hunted with him, that said dog was worth \$200. It was proved, that defendant shot plaintiff's dog when the dog was standing by the side of his master, in no way disturbing the defendant; nor was there any proof that the dog had ever done so, except the injury done to defendant's cows as above shown.

"Upon this evidence, the court charged the jury, that if they believed from the evidence that said dog was of no value, but that the defendant shot him under circumstances aggravating to the plaintiff, they might find against the defendant, and assess exemplary damages, or 'smart money', against him. To this charge the defendant excepted, and requested the court to charge the jury, that if they believed from the evidence that said dog was of no value as property, they could not find for the plaintiff and assess smart money against the defendant; which charge the court refused to give, and the defendant excepted."

All these rulings are now assigned for error.

WM. M. BYRD, for the appellant, contended,—

1. That the "wrongful shooting a dog" is not actionable, unless some damage is alleged to have been done by the shooting; that the complaint only shows an assault and battery on the dog, for which an action does not lie, especially where no actual damage is alleged.—2 Stra. 872; 2 Saunders on Pl. & Ev., pp. 860-64.

2. That the allegation of "other wrongs" is too general, uncertain, and indefinite to authorize the court to proceed to judgment thereon, and, if not surplusage, is demurrable.

3. That the evidence offered to show the height of plaintiff's fence was admissible in mitigation of damages.

4. That exemplary damages cannot be given for injuries to personal property.—2 Greenl. Ev. § 266.

5. That exemplary damages cannot be given for an injury to a thing which is in itself valueless; that the law does not



give any recompense merely for offended feelings, unless there is some actual injury; that although vindictive damages have sometimes been given, in cases of trespass upon the person or upon real property, where no actual injury was done, yet no case has ever extended the doctrine to such trespasses upon personal property.—2 Greenl. Ev. § 266; American Jurist, vol. 3, pp. 292–3; 2 Speers, 271; 14 Missouri R. 104; 13 B. Monroe, 238; 1 *ib.* 81; 5 Rep. 35; 11 Mod. 74; Buller's N. P. 79; Duke of Somerset v. Fogwell, 5 B. & C. 879; 3 Dana, 493, 583; 2 Saunders on Pl. & Ev., pp. 860–61.

RICE, J.—A dog is a species of property, for an injury to which an action at law may be sustained. It is not necessary for the maintenance of an action for shooting a dog, that the dog should be shown to have pecuniary value.—Dodson v. Mock, 4 Dev. & Batt. Law R. 146; Perry v. Phipps, 10 Ired. Law Rep. 259; The State v. Latham, 13 *ib.* 33; Wright v. Ramscot, 1 Saund. R. 84; 2 Bla. Com. 393, 394; Lentz v. Stroh, 6 Serg. & Rawle, 34; King v. Kline, 6 Barr, 318.

Wherever there is a wrongful taking of the property of another, or a wrongful injury done to it, the law implies that the owner has sustained some damage; and although there be in fact no sensible damage from the loss or injury of the property, or from an actual deprivation of its use, the owner is entitled to recover some damages. And if the trespass on the property was accompanied by circumstances of aggravation, "smart money", or "exemplary damages", may be assessed by the jury, although the property itself had no pecuniary value. Board v. Head, 3 Dana, 488; Major v. Pulliam, 3 *ib.* 582; Woert v. Jenkins, 14 Johns. R. 352; 3 Starkie's Ev. 1450–51; Bracegirdle v. Orford, 2 Maule & Sel. R. 77; Merest v. Harvey, 5 Taunton. 442; Dearing v. Moore, 26 Ala. 586.

Although it may be allowable to prove, as a justification for killing a dog, that the dog was a nuisance to the community, and was permitted to go at large (4 Dev. & Batt. 146, and 6 Barr, 318, *supra*); yet there was no error in sustaining the objection to the question put by defendant to a witness, "Whether, from his knowledge of said dog, *he did or did not consider* said dog a nuisance."

There is no error, and the judgment is affirmed.

## HILL vs. AVERETT.

[BILL IN EQUITY FOR ABATEMENT OF OBSTRUCTION OF PUBLIC ROAD—DISSOLUTION OF INJUNCTION ON ANSWER.]

1. *Abatement of obstruction refused, because complainant had resorted to unfair means to compel travel through private way to his ferry.*—H., being the owner of a ferry across the Chattahoochie river, and having opened a private way leading from his ferry into the public road on this side of the river, filed a bill against A. to abate an obstruction erected across said road. A. answered, averring that H. had previously obstructed the public road on the Georgia side of the river, so as to divert public travel from defendant's ferry to his own, and that the obstruction complained of had straightened the public road, placed it on better ground, and been accepted by the overseer of the road: *Held*, that the injunction was properly dissolved on the allegations of the answer.

APPEAL from the Chancery Court of Barbour.

Heard before the Hon. WADE KEYES.

THIS bill was filed by Allen W. Hill against Matthew Averett, alleging, that complainant, being the owner of certain lands lying on both sides of the Chattahoochie river at Florence, Georgia, was authorized by an act of the legislature of that State to establish a ferry across said river at that point, and had his ferry established and in successful operation; that there has been for many years a public road, duly authorized and opened by the Commissioners' Court of Barbour county, Alabama, running between the lands of complainant and one Williams, on the one side, and the lands of Matthew Averett, on the other, and leading to said ferry; that said Averett has recently erected an obstruction across said public road, commencing on his own lands, and extending across said road to the lands of said Williams; that this obstruction changes said public road from the direction in which it was authorized and accustomed to run, and thereby diverted the public travel from complainant's ferry, and rendered his chartered privilege entirely worthless to him; that Averett has no chartered privilege granted to him by the legislature of Georgia to erect either a bridge or ferry

across said river at Florence, and that complainant's is the only chartered ferry at or near that point; that Averett erected said obstruction with a knowledge of complainant's chartered privilege, and with the intent to render the same valueless to him; and that he is now proceeding in said Commissioners' Court of Barbour, for an order to legalize said obstruction and change of the public road. The prayer of the bill is, for an abatement of the obstruction, an injunction against further proceedings in the Commissioners' Court, and for general relief.

The defendant answered the bill, admitting that there was, and for many years had been, a public road in Barbour county, duly authorized and opened by the Commissioners' Court, running between his lands and those of complainant and Williams, and terminating at or near the place on said river where a chartered bridge formerly stood, which fell down and was destroyed about eleven years ago; alleging that complainant's ferry was over one-quarter of a mile from the point where said road terminated, and that there was no road opened by authority of said court, leading from complainant's ferry into this public road. He alleged, also, that at a regular term of said court, held in May, 1848, he was authorized to erect a toll-gate across said public road at its termination on said river, and gave bond and security, as required by the order; that all persons were prohibited by said court from interfering in any manner with his privileges, within one mile of his toll-gate up and down said river; that at the time said bridge fell down, there being no means left for persons to cross said river at Florence, he made a contract with one H. H. Jernigan, who was the agent of the company to whom the lands on which Florence was built belonged, for the establishment of a ferry across the river at that place; that ever since that time he has kept a good ferryboat and competent ferrymen at his ferry, and has kept the same in good order and repair: that the road leading from the Georgia side of said river to his ferry has been in the constant and uninterrupted use and possession of the public for more than twenty years, and the United States mail has been carried over it for more than eleven years; that complainant, a short time before the filing of his bill, obstructed said road,

by cutting ditches across it, &c., and thereby diverted the public travel to his own ferry ; that he also, with the view of interfering with respondent's rights, purchased a tract of land on the Alabama side of the river, through which, without any order or authority from any court in this State, he has lately opened a private road, leading from his ferry to the public road within a half mile of respondent's toll-gate ; that this road runs over low, flat, muddy lands, and compels the public to travel a much worse road, and to go about a mile further to get to Florence, than they would be obliged to go by crossing at respondent's ferry. He further states, "that for the purpose of securing and protecting his rights, respondent commenced, a little west of the point where the lands of complainant, respondent, and said Williams cornered, to throw said public road south of its original course, and caused it to run parallel with the old road, until it reached the old road immediately below the point where it turned down the river to respondent's ferry, leaving a strip of land between the old and new road not more than six or eight feet wide, and leaving the old line of fence running along said strip between said roads ; and at the point where said road leaves the old road, respondent erected a fence across said old road. Respondent further avers, that said public road, as it has been made to run by him, has been rendered more convenient to the public than the old road, not only because it passes over ground equally as good as the old road, but because it shortens the distance to the point where the old road terminates at the river, and throws said road in a straighter line from the point where said new road leaves the old one to respondent's ferry." Respondent avers, also, that said fence is erected entirely on his own land ; that the overseer of said public road, appointed by the Commissioners' Court, pronounces the new road a nearer and better road than the old one, sanctions respondent's act in opening it, and has received it in place of the old road.

The chancellor dissolved the injunction on the coming in of this answer, and his action is now assigned for error.

LEWIS L. CATO, for the appellant :

1. The injunction should not have been dissolved, because



the equity of the bill is not denied by the answer.—*Moore v. Barelay*, 16 Ala. 158; *Calhoun v. Cozens*, 3 *ib.* 503.

2. The injury to the complainant's ferry is the same, whether the public road leads to it or not. Admitting that the road does not lead to it, still the bill shows the injury, and the answer admits enough to constitute the equity; admitting a public road, his fencing it, and the injury to complainant.—*Barney v. Earle*, 13 Ala. 106.

3. On motion to dissolve an injunction, whenever it appears that the complainant was entitled to an injunction at the time of obtaining it, but there still remains a dispute between the parties, the injunction is invariably continued until final hearing, or until further order.—*Lynch v. Colegate*, 2 Har. & John. 36.

4. The Commissioners' Court of Barbour county had no jurisdiction to license the defendant's toll-gate. Their authority is where the water-course is in their county.—*Clay's Digest*, p. 513, §§ 25 to 32.

5. A private person has no right, without a charter, to establish a ferry on a public highway; and the defendant had no legal right, under his contract with Jernigan for his ferry, to be affected by complainant's ferry.

6. If the complainant obstructed the public road in Georgia, he is amenable to the laws of Georgia; and this furnishes no excuse for the defendant's obstruction of the road in Alabama.

JAMES L. PUGH, *contra*:

1. If the bill has any equity, it is contained in the allegation that a public road, leading to complainant's ferry, has been obstructed, and the public thereby prevented from crossing at his ferry. The answer denies that there is any public road leading to his ferry, and alleges that he has himself changed the public road over worse ground, and increased the distance to Florence. If he has forced the public out of the highway on the Georgia side, by cutting ditches and felling trees across it, to compel them to travel his private way and to cross at his ferry, he cannot, on the failure of such measures, ask relief of chancery. He presents himself in the attitude of a wrong-doer asking the court to sanction his own

wrongful act. He made the road run to his ferry by violating the law in changing it; and because he went on the Georgia side, and thus avoided an indictment, he now says there was no wrong in the act because he was out of the jurisdiction. He must come into equity with clean hands, and do equity, before he can ask it.

2. The Commissioners' Court had jurisdiction over the subject-matter, and the toll-gate was properly established.

3. The defendant's obstruction of the road was no injury to the public, since it was put on better ground, and made straighter.

4. The bill is not framed for relief against injury to the complainant from obstructing his private right of way.

CHILTON, C. J.—We think the chancellor correctly dissolved the injunction in this case. It appears from the answer, that Hill has been resorting to unfair means, on the Georgia side, to divert the travel from the defendant's ferry and toll-gate, and has opened a private way leading from his (Hill's) ferry to the public road on this side of the river. This private way has been interfered with, by the defendant's building a fence on his own land, and so changing the public road as to straighten it, and make it pass over better ground; and this change, it is averred, has been adopted by the overseer of the road, &c.

Now we think it nothing but reasonable, that Hill, the appellant, who has endeavored to compel persons traveling from the east side of the river, along this public road, to cross at his ferry, and thereby to pass around the ferry and toll-gate of respondent, should have a road leading from his ferry to the public road on this side of the river, *which he may be compelled to keep in repair*, and not one which he may open or close at pleasure, and for the repair of which he is in no way bound. If he desires to have a road to his ferry on the Alabama side, let him appeal to our Courts of Roads, &c.; and if it is proper he should have one as a private way, the law makes provision for it.—Code, §§ 1187, 1188. In that case, however, he must keep the road in repair, as well as compensate the "owners of land, over which the road passes, all damages resulting thereto from the establishment of such

road, to be assessed as in case of public roads."—Code, *supra*.

Until he acquires some right of this kind, and places himself under some obligation to the public to repair the road—in other words, until either a public road or private way is established by law, we do not think the chancellor, in a case *the exigencies of which make no stronger appeal for the exercise of preventive justice than the present*, should interpose his extraordinary powers and enjoin, or order the fence of a coterminous land proprietor to be taken down, because it interferes with such way. We will not say that there is no case where the chancellor can remove an impediment or obstruction in a private way which is not established by law: we confine our opinion to the case before us, as disclosed by the record.

Let the decree be affirmed.

## ABERCROMBIE'S EXECUTOR *vs.* ABERCROMBIE'S HEIRS.

[BILL IN EQUITY BY EXECUTOR FOR CONSTRUCTION OF WILL AND DIRECTIONS AS TO EXECUTION OF TRUSTS.]

1. *Validity of directions by will concerning government and treatment of slaves.*—If a testator gives specific directions by will to his executor, concerning the treatment and government of his young slaves, until they arrive at the age fixed for their emancipation, which contemplate that they shall remain in this State and yet occupy a condition of qualified freedom, the trust is invalid, since our law recognizes no other *status* than that of absolute freedom or absolute slavery; but where he directs his executor "to receive them into his possession, to take care of, protect, govern, and control them, until they arrive at age, according to the laws of this State, treating them with humanity according to the position they occupy in society, and see that they are not imposed upon by others", the directions create no additional obligation on the executor to that which would exist independently of them, and are not illegal.
2. *Validity of bequest of freedom to slaves.*—A bequest of slaves to an executor, with directions "to have their freedom secured to them when they shall have arrived at age, by the laws of this State, if it can be done, so that they may remain here, and, if he cannot do so, to send them to some free State or country, wherever in his discretion will be best for them," is a valid trust, which the executor, under our existing laws, has full authority to execute;

## Abercrombie's Executor v. Abercrombie's Heirs.

and if the laws in force at the time fixed for their emancipation should not allow them to remain in this State free, and the executor should then refuse to remove them, after having submitted his administration to a court of equity, although the slaves themselves might not be able to enforce the execution of the trust by suit, the court would have ample powers to enforce it.

3. *Parol evidence inadmissible to supply omission in written will.*—There is no legal principle more firmly established by the uniform and constant decisions of judicial tribunals, than the rule which declares that an omission in a written will cannot be supplied by parol.
4. *Validity of pecuniary legacies to slaves.*—A pecuniary legacy to a slave, to vest immediately on the testator's death, is void, because he is incapable of taking as legatee; but if the legacy is not to be paid until the time fixed for his emancipation, and there is no express gift before the time of payment, it is valid.
5. *Residuary legacy to person incapable of taking distributable among next of kin.*—If a testator appoints as his residuary legatees a slave woman and her children, and directs the emancipation of the children only, the legacy to the mother is void, and she herself, with her portion of the residuary legacy, must be regarded as property not disposed of by the will, and therefore distributable to the next of kin under the statute.
6. *Bequest to executor in trust enures to next of kin on failure of trust.*—Where property is bequeathed to an executor in trust for a specific object, which fails or is declared invalid, he takes no personal interest in it, but a resulting trust then arises in favor of the next of kin.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. WADE KEYES.

THIS bill was filed by Robert J. Ware, as executor of the last will and testament of Albert G. Abercrombie, deceased, against the heirs-at-law of said decedent; asking the court to construe his will, and to decide upon the validity of the bequests contained in it. The said will, which was signed, sealed, and delivered in the presence of three witnesses, dated December 15, 1848, and admitted to probate in the proper office in Montgomery county on 20th February, 1849, is in these words:

"THE STATE OF ALABAMA. MONTGOMERY COUNTY.

"Know all men by these presents, that I, Albert G. Abercrombie, of the State and county above written, being in ill health, but of a sound mind and memory, and believing that I am not to live long upon this earth, and being desirous of arranging my affairs before death, do make this my last will and testament, as follows:



"I, Albert G. Abercrombie, for and in consideration of the sum of one dollar in hand paid, the receipt whereof is hereby acknowledged, do bargain, sell, and convey unto Robert J. Ware, of the above State and county, all of my property, both real, personal, and mixed, to have and to hold the same for the purposes hereinafter mentioned—to-wit: The said Robert J. Ware is to receive into his possession, at my death, negro woman Nancy, and her six children—to-wit, Jack, Ellen, Nick, Bonaparte, Susan and Louisa; and the said children above named the said Ware is to take care of, protect, govern, and control, until they arrive at age, according to the laws of this State, treating them with humanity according to the position they occupy in society, and see that they are not imposed upon by others. And when the said six children shall have arrived at age, the said Ware is to have their freedom secured to them, by the laws of the State of Alabama, if it can be done, so that they may remain in the State. If he cannot do so, he, the said Ware, is to send them to some free State or country, wherever in his discretion will be best for them.

"Now, in order to induce and enable the said Ware to carry out the above conditions, I, the said Albert G. Abercrombie, do hereby convey and deliver over all of my property, as above written, at my death, unto the said Robert J. Ware, to use, manage, control, sell, and dispose of, in such manner as the said Ware may think best; and after having paid such debts as I may justly owe, and having compensated himself for such trouble and expense as he may have incurred for and on account of the six children above named, of which amount he, the said Ware, shall be the sole judge to determine, the remainder, if any, shall be paid over to the said six children and their mother Nancy.

"And in order that the said Robert J. Ware may have a full and free discretion in the premises, it is my particular request and desire, that he shall not be held liable to make returns to any court of his doings and acts, and that he shall not be required to enter into bond and security for the performance of the above request, but that the whole matter shall be left entirely to his judgment and discretion. And in order that there shall be no disappointment in the perform-

ance of the above request, in case of the death of the said Robert J. Ware before the said six children shall have arrived at age, I hereby confer the same power to the executor or administrator of the said Robert that I have conferred upon him. And I, the said Albert G. Abercrombie, do by these presents make the provisions of this conveyance irrevocable on my part, but not to take effect until my death, when it is to go fully into effect.

" Given under my hand and seal," &c.

The defendants filed answers, insisting that the bequests were invalid and contrary to the policy and statutes of the State.

On final hearing, the chancellor decreed,—

" 1. That the complainant may have the freedom of the children secured to them, so that they may remain in this State, at the time when they shall have arrived at twenty-one years of age, if at that time it can be done; but if their freedom cannot then be secured, so that they can remain in this State, then the complainant may remove them to such non-slaveholding State or country as in his discretion he may elect.

" 2. That if the youngest child should die before attaining twenty-one years of age, then the time of emancipation will be when the next youngest shall have arrived at the age of twenty-one years; *et sic de similibus*.

" 3. That until the emancipation of the children shall have been effected in this State as aforesaid, or until they shall be started to a non-slaveholding State or country, to which they shall in good faith be carried, or attempted to be carried, they must be accounted for as slaves belonging to the estate of the testator.

" 4. That the woman Nancy is subject to distribution, and may be sold by the complainant.

" 5. That the portion attempted to be given to her must be distributed among the testator's next of kin.

" 6. That the residue of the estate, after deducting debts, expenses, and reasonable compensation to complainant, may be equally divided among the children, or the survivors, after their emancipation.

" 7. That if the complainant should die before the children shall have arrived at twenty-one years of age, his executor or

administrator may act in the premises, as the complainant himself might have done.

"8. That the settlement of the testator's estate be removed to this court, and that the executor make annual settlements thereof before the register, until he shall be finally discharged.

"9. That the defendants be perpetually enjoined from litigating with complainant in other courts about the testator's estate.

"10. That the complainant pay the costs of this suit out of the estate of his said testator.

"11. And that he have leave, from time to time, to apply for further instructions."

From this decree each party appealed, and cross errors are here assigned. The errors assigned by the executor are,—

1. That the chancellor erred in decreeing, that until the emancipation of the children shall have been effected in this State, or until they shall be started to a non-slaveholding State or country, they must be accounted for as slaves belonging to the testator.

2. In decreeing that the woman Nancy is subject to distribution and may be sold by complainant.

3. In decreeing that the portion attempted to be given to her must be distributed among the testator's next of kin.

4. In not decreeing that the woman Nancy was comprehended in the same trust with her children, and with them entitled to freedom when carried out of the State.

5. In not decreeing that, if said Nancy was not free when carried by the executor to a non-slaveholding State, she should be held as the property of her children after removal, and also her hire accruing.

6. In not decreeing that said Nancy, with her hire, was the property of said Ware by the terms of the will.

On the part of the heirs-at-law the errors assigned are,—

1. That the chancellor should have decreed the bequest to the executor of Nancy and her six children, upon the trusts in the will, to be invalid.

2. That he should have decreed the devise and bequest to the executor of all the testator's estate, upon the trusts in the will, to be invalid.

3. That he erred in declaring the trusts valid.

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Abercrombie's Executor v. Abercrombie's Heirs.

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JAS. E. BELSER, and WATTS, JUDGE & JACKSON, for the executor.

ELMORE & YANCEY, for the heirs-at-law, *contra*.

(No briefs have come to the Reporter's hand.)

GOLDTHWAITE, J.—If, by the directions given by the testator as to the government and treatment of the children until they arrived at age, it was intended that until the period fixed for their emancipation, they should occupy a condition of qualified freedom, then, unquestionably, the trust would be invalid. Our law recognizes no other *status*, than that of absolute freedom, or absolute slavery; and if it was the object of the testator that the slaves should remain in the State, invested with privileges which by law do not belong to that class of population, the intention would be illegal, and the trust in which it was embodied invalid.—*Washington v. Blunt*, 8 Ired. Eq. 253; *Atwood v. Beck*, 21 Ala. 588, 615.

The directions, however, in our opinion, amount to nothing whatever, as they impose no obligations upon the executor, which would not exist if the clause referred to had been omitted. The injunction is, in effect, simply to take care of the slaves, and to treat them with humanity; and whatever may have been the intention of the testator, there is certainly nothing in the language used, from which it could legitimately be inferred that the children were to occupy any other position than that of slaves, or to be treated in a manner which was in any respect incompatible with that condition. It is the moral, if not the legal duty, of every master or owner, to observe towards his slaves the same general course of conduct, which the testator in these directions prescribed; and this being the case, we cannot say that there is anything illegal in them. If, however, it was conceded that they were contrary to law, we do not see that either party would gain anything by the concession; as the fact that one of the legacies may be invalid, does not affect other bequests which are independent of it.—*Florey v. Florey*, 24 Ala. 241.

As to the directions given by the testator for the emancipation of the children of Nancy, there can be no doubt that, under our decisions, it was a perfectly valid trust, and one which the executor, under the existing laws, would have full



authority to execute, by taking them to a free country and manumitting them.—Beck v. Atwood, *supra*. Should the laws in force in this State, at the period fixed for their emancipation, prevent the intention of the testator in respect to their remaining in this State as free, from being carried out, it may be that the slaves themselves might not be able, by a suit, to enforce the trust; but if it be so, in relation to which we express no opinion, it cannot affect its validity so far as the executor is concerned; and if he was so regardless of duties, which he had voluntarily assumed, and of the oath which he had taken to discharge them, as to fail in the faithful execution of the trust, the powers of the court of chancery, to which by his bill he has submitted the administration, are amply sufficient to enforce it; and the rule which might operate to prevent the beneficiaries themselves from enforcing it by suit, would have no application.

It is clear, also, that by the terms of the will, the slave Nancy is not to be emancipated. If we were at liberty to resort to parol evidence, the case might be different. But the words of the instrument are not such as to allow this. There is no provision made, or direction given, as to her emancipation. The executor is to take Nancy and her six children into possession; and the testator then gives instructions as to the treatment of the children, and then proceeds, after a full stop, "And when the said six children have arrived of age, the said Ware is to have their freedom secured to them," &c. There is no rule or principle which would authorize us to refer the word "their", in the clause we have quoted, to any other antecedent than the "six children"; and this being the case, we must inflexibly adhere to the will itself, although the result may be that the intention of the testator may be partially defeated. There is no legal principle more firmly established—none that has received a more constant and uniform support from the judicial tribunals, than the rule which declares, that an omission in a written will cannot be supplied by parol evidence.—Cheney's case, 5 Rep. 68; Vernon's case, 4 *ib.* 4; Strode v. Faulkland, 3 Ch. R. 98; Brown v. Selwin, Cas. temp. Talb. 240; Lawrence v. Dadeville, 1 Ld. Raym. 438; Bennett v. Davis, 2 P. Wms. 316; 1 Ves. (sen.) 189; Walpole v. Cholmondely, 7 T. R. 138; 1 Greenl. Ev., §§ 290, 291.

As to the legacies directed by the will to the children of Nancy, it is certain that, if it was the intention of the testator they should vest at his death, they must be held void, for the reason, that slaves are incapable of taking ; but the decision of this question depends upon the rational interpretation of the whole instrument. There are no words which force us to this conclusion. The legacies are not to be paid until the period fixed for the emancipation of the legatees, and there is no express gift of the legacies before the time of payment. In addition to this, the gift is to a class of persons who are incapable of taking before that time ; and these circumstances, we think, are conclusive as to the intention of the testator, that the payment was not to be made until the leading object, which it is apparent he had in view, was accomplished—the emancipation of the slaves referred to. Upon this construction, the legacies to the children were valid.—*Atwood v. Beck, supra.*

The bequest to the slave Nancy was void, as she had no capacity to take ; and she herself must be regarded as property not bequeathed by the will, for the reason, that the provisions in relation to emancipation do not apply to her, and she is not embraced in the trust which authorizes Ware to sell and dispose of the property. Although the last is general in its terms, it is manifest that it was not the intention of the testator to include her, as he gives her a portion of the proceeds of the property to which this trust extends ; and although the gift is void, it is not the less expressive as indicating the intentions of the testator in this respect. It follows, necessarily, therefore, that this slave, and the portion bequeathed to her out of the proceeds of the other property, must be regarded as not disposed of by the testator, and subject to distribution.

In opposition to the views we have expressed upon the last point, it has been urged, that if the slave Nancy is not included in the emancipation clause, and the legacy to her is void, still under the will she becomes the absolute property of Ware. This position is not tenable. The property was conveyed to Ware for the execution of certain specified trusts, and for no other purpose. Those trusts were, the manumission of certain slaves, and the payment of the legacies bequeathed

to them. Where the testator fails to make a complete and effectual disposition of all his property, the law makes the disposition which he has failed to do; and the principle equally applies to those cases where the estate is devised or bequeathed to a trustee. A resulting trust to the property not disposed of is then created in favor of the heir or distributees.—1 Jarm. on Wills, 502, and cases there cited.

It results from the views we have expressed, that the decree of the chancellor was in all respects correct.

Judgment affirmed, at the cost of the appellant.

### MAY vs. KELLY & FRAZIER.

[ACTION UNDER CODE, AGAINST OWNERS OF STEAMBOAT, ON BILL OF EXCHANGE DRAWN BY CLERK, AND ACCEPTED BY CAPTAIN.]

1. *Drawee only can accept, except for honor.*—Where a bill of exchange is directed to a particular person, nobody but the person to whom it is directed can accept it, except for honor; and therefore, in declaring against one as acceptor, a count is demurrable, which alleges that the bill was payable at a particular counting-house, but does not aver that it was directed in blank, or that it was drawn upon the defendant, or that he accepted it for honor, or that he resided or did business at said counting-house.
2. *Agent's authority to accept must be averred.*—In declaring against the principal, on a bill accepted by his agent, the agent's authority to accept must be averred: it is not sufficient to allege, that he was the agent, and as such agent accepted for the principal.
3. *Captain of steamboat cannot bind owner by individual acceptance.*—The acceptance of a bill of exchange by the captain and master of a steamboat, in his own name as captain, does not bind the owner as acceptor.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Kelly & Frazier against James T. May, on a bill of exchange of the following tenor:

“Exchange for \$476. Louisville, Ky., November 11, 1852.

“Nine months after date of this first of exchange (second of same tenor and date unpaid), pay to the order of the Mer-

May v. Kelly &amp; Frazier.

chants' Louisville Insurance Company, payable at the co. room of May & Vanhook, New Orleans, four hundred and seventy-six dollars, value received, and place the same to account of insurance on S. Bt. Messenger.

"To Capt. B. W. Bell,  
for St. Messenger & owners,  
Mobile, Ala. } FRANK BELL, Clerk."

The complaint contained three counts—to-wit:—

"The plaintiffs claim of the defendant \$476, with interest, upon the acceptance by B. W. Bell, captain of the steamboat Messenger, for said steamboat and her owners, of which steamer defendant was then owner, of the draft of 'Frank Bell, clerk', dated Louisville, Ky., November 11, 1852, for the sum aforesaid, payable nine months after that date at the counting-house of May & Vanhook in New Orleans, to the order of the Merchants' Louisville Insurance Company, (for insurance of said steamboat,) and by said company (by Wm. Prather, secr'y) endorsed to said Kelly & Frazier; which draft has been duly protested for the non-payment thereof, and is still unpaid; of all which said defendant had due notice.

"Also, upon the acceptance by the defendant, by B. W. Bell, of another draft, in all respects like the one above described, and which is still unpaid.

"And plaintiffs, by leave of the court now here granted, further complaining, claim of said defendant the further sum of \$476, with interest thereon, for that whereas, heretofore, to-wit, on the 11th day of November, A. D. 1852, the said defendant was owner of a steamboat, named and called 'Messenger', and one B. W. Bell then the captain and master of said boat, and agent of the owner or owners thereof and of the defendant; and the said B. W. Bell, as such captain and agent, then accepted a draft, or bill of exchange, by writing his name across the face of it, thus, 'B. W. Bell, capt.'; drawn and dated on the year aforesaid by one Frank Bell, who was then clerk of said steamboat and keeper of the accounts thereof, upon and addressed to the said B. W. Bell, captain and agent as aforesaid, as such, by the name and addition of 'Capt. B. W. Bell, for st. Messenger & owners, Mobile, Ala.', for the sum of \$476; payable nine months after the date thereof, at the counting-room of May & Vanhook in New Or-



leans, to the order of the Merchants' Louisville Insurance Company, for insurance of said steamboat by said company ; who then and there endorsed, by Wm. Prather, their secretary, the said bill of exchange to the plaintiffs ; which bill of exchange is still wholly unpaid."

The defendant demurred to the complaint, but his demurrer was overruled ; and he then pleaded the general issue.

On the trial, as appears from the bill of exceptions, the plaintiffs read in evidence the bill of exchange declared on, with the endorsements thereon, "and then proved, by one Thomas Adams, that said defendant, at the date of said bill of exchange, was the owner of said steamboat Messenger, B. W. Bell the captain, or master, and Frank Bell the clerk ; and that the insurance company mentioned in the draft was engaged in the business of insuring boats, and Wm. Prather, the endorser of the draft, was the secretary of said company. This was all the evidence, except the protest of the bill for non-payment, and the interest law of Louisiana."

"The court charged the jury, upon this evidence, that if they believed it, the acceptance not being denied by a sworn plea, the plaintiffs were entitled to a verdict.

"To this charge the defendant excepted, and asked the court to give the following charges :—

"1. That the draft did not support the complaint, and varied from that described therein.

"2. That in order to bind the defendant, it was necessary to show that the draft was accepted in his name, or by some name used by him, adopted for that purpose by B. W. Bell ; and that the draft, accepted 'B. W. Bell, capt.', did not bind May, nor follow the complaint."

The court refused these charges, and to each refusal the defendant excepted ; and he now assigns for error the overruling of his demurrer to the declaration, the charge given, and the refusal to charge as requested.

K. B. SEWALL and J. C. BOLLING, for appellant :

1. The demurrer to the declaration ought to have been sustained, because neither count showed a legal liability on the part of the defendant. The first count shows no authority in Bell to accept a bill of exchange for defendant : the aver-

ment that he accepted "for the steamboat and owners", is no averment of his authority so to accept. The second count is defective for the same reason; and the third, though more specific, is equally defective. It was not sufficient to aver that Bell was the agent of May, since he may have been his agent, and yet had no authority to accept a bill for him. The fact of agency does not, *ex vi termini*, import authority to accept a bill of exchange.—*Childress v. Miller*, 4 Ala. 447; *Brooks & Wilson v. Harris*, 12 *ib.* 555.

2. The bill offered in evidence is variant from that described in the first count, because it does not purport to be accepted by "B. W. Bell, captain, for steamboat and owners"; and from that described in the second count, because it does not purport to be the acceptance of the defendant by Bell.

3. The bill offered in evidence, with the other proof in the cause, shows no liability on the part of May to pay it. To make the principal liable on a written contract made by his agent, it must appear to be executed in the name of the principal.—*McTyler v. Steele*, 26 Ala. 492; 10 Wend. 271; 8 Mees. & W. 834; *Story on Agency*, § 207. Exceptions to this general rule are, contracts signed by the master of a vessel in his own name, in the usual course of his employment, such as bills of lading, contracts for repairs, &c.; but the scope of his employment does not embrace the acceptance of bills of exchange, even for necessities, so as to bind the owners.—*Abbott on Shipping*, 172; *Ware's Rep.* 263; 10 Metc. 380; 3 *Story's R.* 475; 10 B. & C. 135. The master of a ship, merely as such, has no authority to insure the ship; nor is the ship's husband, even when a part owner, authorized to insure for the other owners, without directions to that effect. 3 *Phil. Ev.* (3d ed.), p. 534, §§ 1854, 1855; 5 Burr. 2227–30; 2 Stark. 345; 8 Wend. 144; 7 B. Mon. 595; 35 Maine R. 542; 1 Metc. 16; 5 *ib.* 192.

MANNING & WALKER, *contra*, made these points:—

1. If either of the counts was good, the demurrer was properly overruled.—*Kent v. Long*, 8 Ala. 25; *Firemen's Insurance Co. v. Cochran & Co.*, at the present term. And if the proof sustained either count, though in itself imperfect, the plaintiffs were entitled to a verdict.—3 Port. 45.

2. That the form of the agent's act was sufficient to bind the principal, see *Martin v. Dortch*, 1 Stew. 480; *Skinner v. Gunn*, 9 Port. 305; *Stringfellow v. Marriott*, 1 Ala. 573; *McTyer v. Steele*, 26 *ib.* 487; *Montgomery v. Elliott*, 6 *ib.*

3. That the acceptance could not be denied without a sworn plea.—*Martin v. Dortch*, *supra*; *Sorrelle v. Elmes*, 6 Ala. 706; *Fowlkes & Co. v. Baldwin*, 2 *ib.* 705; *Montgomery v. Elliott*, *supra*; *Lazarus v. Shearer*, 2 Ala. 726; *McWhorter v. Lewis*, 4 *ib.* 200.

4. The bill is drawn by the clerk of the boat, on the captain, for the owners, on account of the boat's insurance. It was drawn on the captain as the representative of the owners, and "for" them; and his acceptance, not being qualified by him, must be taken to be in that character.—*Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; 7 B. Mon. 596.

RICE, J.—Conceding that a bill, directed in blank, may be accepted by anybody, and be a good bill; and conceding, also, that notwithstanding the want of an address to any particular person, as drawee, the bill may, if it be drawn payable at a *particular house or place*, without mentioning the *name* of any person who resides or does business at that house or place, be well deemed a good bill in favor of an endorsee; and that the acceptance by another person of such bill is an acknowledgment that he was the person to whom it was directed, and therefore sufficient to bind him as acceptor; yet, when the bill is directed to a *particular person*, nobody but the person to whom it is directed can accept it, except for honor.—*Davis v. Clarke*, 1 Carrington & Kirwan, 177; *Gray v. Milner*, 2 Stark. R. 336; *Gray v. Milner*, 8 Taunt., 739; *Polhill v. Walter*, 3 Barn. & Adol. 114; *Jackson v. Hudson*, 2 Camp. R. 447; *Story on Bills*, §§ 58, 121, 124, 253, 258; 8 Dana, 134.

The first and second counts of the complaint in this case are bad on demurrer, because each of them shows that the bill was payable "at the counting-house of May & Vanhook in New Orleans"; but neither of them contains any allegation, which shows that the bill was drawn upon the defendant, or that it was directed in blank, or that he accepted it for honor, or that he resided or did business at said counting-house.

The first count is bad for another reason—to-wit, that although it alleges that the defendant was the owner of the steamboat, and that Bell, the captain thereof, accepted the bill “for said steamboat and her owners”, yet it does not allege or show *his authority* thus to accept and thus to bind the defendant.

The third count is bad, for the reason, that although it alleges that B. W. Bell was the captain and master of said steamboat, and agent of the owner or owners and of the defendant, and that “the said B. W. Bell, as such captain and agent”, accepted the bill, “by writing his name across the face of it, thus, ‘B. W. Bell, capt.’; yet it does not allege or show *his authority* to accept any bill for the defendant, or to bind the defendant by that or any other acceptance.

B. W. Bell may have been the agent of the owner of the steamboat, and the agent of the defendant, and yet have had no authority *to accept any bill for the defendant*. It was not enough to aver that Bell was the agent of the defendant. It was incumbent on the plaintiffs to know the extent and nature of his authority as agent, or, at all events, to have alleged that his agency embraced or authorized the acceptance of the bill. His *authority* to accept the bill must appear otherwise than from his acts, before it can be assumed that his acts are binding on his principal.—Wallace v. The Branch Bank at Mobile, 1 Ala. R. 565; Scarborough v. Reynolds, 12 *ib.* 252, and cases therein cited; Pope v. Nickerson, 3 Story’s R. 465.

There is nothing in the legal relation between the captain and master of the steamboat and its owner, which, of itself, conferred upon the captain and master authority to bind the defendant as owner, by such an acceptance of a bill as is alleged in the third count.—Bowen v. Stoddard, 10 Mete. R. 375; Pope v. Nickerson, 3 Story’s R. 465.

If any one of the three counts had been good, there would have been no error in overruling the demurrer, which was interposed to the complaint as a whole; but as all the counts are bad, the court below erred in overruling the demurrer to the complaint; and for that error its judgment is reversed, and the cause remanded.



## CRAYTON vs. JOHNSON.

[BILL IN EQUITY TO ENJOIN ACTION AT LAW FOR CONTRIBUTION.]

1. *When equality is equity.*—When parties stand in *æquali jure*, with reference to liabilities arising *ex contractu*, equality of burthen becomes equity.
2. *How this equity may be destroyed.*—But, although parties are equally bound to bear the burthen of any loss which may accrue from their joint contract, this equality may be destroyed by the act of one party in superinducing the loss, or by their subsequent contract.
3. *Jurisdiction of equity where remedy at law is plain, adequate, and complete.*—A party cannot come into equity to enjoin an action at law for contribution, when his bill shows that he has a plain, adequate, and complete remedy at law, and he does not ask a discovery.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by William L. Crayton against Thomas D. Johnson, to enjoin an action at law for contribution commenced by said Johnson in the Circuit Court of Chambers, under the following state of facts: Crayton, Johnson, John Dailey, and James H. Bryan, as partners in the "Chickamaugee Land Company", were equally interested in a large quantity of lands lying in (what was originally) Cherokee county, Georgia. The State of Georgia had established a lottery of the Indian lands in said Cherokee county, in which each resident citizen was entitled to a ticket; and it was provided that the drawer of a lot should not be entitled to take possession of it, if an Indian was residing on it, until after the removal of the Indians by the Government; "but the sale of lots then in possession of Indians was held lawful and binding between the parties, under the laws of Georgia, the possession of the Indian not being regarded as an adverse possession." Under this lottery, one Norwood drew a certain tract of land, which is particularly described in the bill, and which was afterwards (in 1833 or 1834) sold by him to said land company, and conveyed by deed, for the benefit of the company, either to Crayton individually, or to him and Johnson jointly. This tract of land the company sold to one

Joseph Cavender, in 1835 or 1836 ; the sale being made by said Bryan, who executed to Cavender his individual bond for title ; and the money realized from the sale was divided among the members of the company. "At the time of this sale", as the bill alleges, "Cavender knew that an Indian was in possession of the land, and was also aware of the law which prohibited the issuance of a grant from the State until the Indian was removed ; and he made the purchase with a knowledge of these facts." After the sale to Cavender, Johnson purchased the interests of said Dailey and Bryan in said company, and also purchased Crayton's interest some time in 1837 or 1838 ; and by the terms of said purchase, agreed with Crayton that he would obtain grants for all the "ungranted" lands which said company had purchased, whether then sold or unsold, and gave Crayton his written obligation to that effect. On the 17th September, 1838, Crayton and Johnson executed their joint deed to Cavender, with covenants of warranty of title, for said tract of land previously sold to him by said company, and took up said Bryan's bond for title ; but the bill does not state whether this was prior or subsequent to Johnson's purchase of Crayton's interest in the company.

The bill further states, that the Indians were all removed from the State of Georgia about the year 1837, and the Indian who resided on said tract of land conveyed to Cavender emigrated before that time ; that on 21st December, 1843, an act was passed by the legislature of the State of Georgia, "giving the drawers of lots in the lottery until the 1st October, 1844, to take out their grants, and providing, on their failure to do so, that the same should be forfeited to the State"; that said Johnson, at any time between the removal of the Indian, in 1837, and said 1st October, 1844, might have procured a grant of said land for Cavender, but he wholly failed to do so, and in consequence thereof said land reverted to the State, and was granted to one William Marten in April, 1845 ; that said Marten instituted an action in the Superior Court of Walker county, Georgia, for the recovery of said land from the person then in possession, and recovered a judgment for the same in April, 1848 ; that one Benjamin Brock thereupon instituted an action against said Johnson, for a breach

of the warranty of title contained in said deed to Cavender, and recovered a judgment against him, on the 27th August, 1851, for \$1,017, besides costs; that the suit instituted by Johnson against complainant, which is now sought to be enjoined, is brought to recover the amount of one-half of this judgment.

The chancellor dismissed the bill for want of equity, holding that the remedy at law was plain, adequate, and complete; and his decree is now assigned for error..

WHITE & PARSONS, for the appellant :

The contract, under which Johnson sues Crayton at law, is an implied one, arising out of the fact that he has paid money under their joint warranty; while Crayton's claim is founded on Johnson's breach of the contract to grant these lands. This claim is necessarily an action in damages for a breach of that contract, and it is doubtful whether he can make it available at law. "The equitable right to retain must grow out of, or be connected with, the case in which the judgment is vacated; but, if the defendant has another cause of action, in which he will be entitled to recover as much as he retains, he must become the actor in a suit, and have his damages ascertained by a judgment.—Dupuy v. Roebuck, 7 Ala. 484. It is true, the measure of damages in such action would be the amount for which he is now sued at law; and it is equally true, that this recovery would be on a contract growing out of the very case in which he is sued, and founded on the same matter; and where there is a connection between the demands, equity allows a set-off, under particular circumstances.—Story's Equity, § 1434. Wherever there is a trust between two men, on each side, that makes a mutual credit.—Easum v. Cato, 5 B. & Ald. 861.

JAMES E. BELSER, *contra*, made these points :—

1. Where there is an unembarrassed remedy at law, equity will not interfere.—Caraway v. Wallace, 2 Ala. 542; Barrett v. Manning, 18 Vermont, 365; Loftin v. Espy, 4 Yerger, 84.

2. There is nothing shown in complainant's bill to give equity jurisdiction.—Knotts v. Tarver, 8 Ala. 743; Clark v. Clark, 4 Port. 9; Eubank v. Poe, 3 Dana, 143; Talbot v. Banks, 2 J. J. Marsh. 550.

3. A party cannot come into equity, merely to obtain the benefit of a set-off; but if his claim is susceptible of legal proof, and such as may be set off, his remedy is at law, and not in equity.—Gibbs v. Clagett, 2 Gill & John. 14; Cummins v. White, 4 Blackf. 356.

CHILTON, C. J.—It is an admitted principle of law, that where parties stand in *æquali jure*, with reference to liabilities arising *ex contractu*, equality of burthen becomes equity. 4 Kent, 390, 391, ed. of 1854.

In this case, the parties, being equally bound by the covenants in their joint deed to Cavender, were equally bound to bear the burthen of any loss which might accrue therefrom; but this equality can be destroyed by the act of the party in superinducing the loss, or by their mutual contract subsequently entered into. If the goods of a party are necessarily thrown overboard in order to save the ship, he has the right to have contribution; but if such party occasion the distress by boring a hole in the vessel, he is legally the cause of his own loss, and must suffer it. In the case at bar, by a written contract entered into after the joint conveyance was made to Cavender, Johnson undertook to obtain a grant for the land which they had so conveyed. The bill shows that this was practicable, and his failure to do so resulted either from his negligence, or wilful refusal. The failure to obtain the grant, which Johnson had bound himself to obtain, is the cause of the loss, a portion of which he is seeking to recover from Crayton; and such being the case, he has not even a plausible pretext for instituting his action for contribution.—24 Ala. 285. If the allegations of the bill be true, the complainant has a clear, adequate, and complete remedy at law; and as he comes into equity for relief, and not for discovery merely, the chancellor properly remitted him to his legal defence, by dismissing his bill. By an express provision in the Code, aside from the rule so generally recognized before its adoption, the powers and jurisdiction of courts of chancery do not extend to cases in which a plain and adequate remedy is provided in the other judicial tribunals.—§ 602.

Decree affirmed.



SIMMONS *vs.* WILLIAMS.

[BILL IN EQUITY TO ENJOIN JUDGMENT AT LAW ON GROUND OF EQUITABLE SET-OFF.]

1. *When distinct cross demands may be set off in equity.*—The mere existence of mutual and independent demands does not authorize the interposition of equity to set them off against each other; but, to warrant the interference of equity, there must be circumstances from which it can be inferred that one debt was contracted on the faith of the other, or that there was an agreement between the parties that the one should be discounted from the other, or there must be some other intervening equity which renders the interposition of that court necessary for the protection of the demand sought to be set off.
2. *Demand due to administrator cannot be set off in equity against his individual debt.*—An administrator *de bonis non* having recovered a decree, on final settlement, against the administrator in chief, the money was collected under execution against the surety on the latter's official bond; and the decree having been afterwards reversed on error, the surety sued at law to recover the money: *Held*, that the defendant could not enjoin the judgment at law, by alleging that he had paid over the money to the distributees of the estate, some of whom were insolvent and non-resident; that he had subsequently recovered another decree against the principal administrator, on which execution had been issued and returned 'no property'; and that the surety had been indemnified by his principal.
3. *General prayer authorizes what relief.*—Under the prayer for general relief, when the bill is not filed in a double aspect, no relief can be granted which is inconsistent with that specifically prayed for.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by the appellant, James L. Simmons, against Thomas R. Williams and William C. Price, and alleged these facts: That, in 1840, said Price, as sheriff of Benton county, was duly appointed administrator, with the will annexed, of William Burns, deceased, and as such received a large amount of property belonging to his estate; that on 14th January, 1842, on the application of the distributees of the estate, said Price was removed from said administration, and complainant was duly appointed administrator *de bonis non* of said estate; that said Price was afterwards cited by complainant, to appear before the Orphans' Court of said county and settle his administration on said estate, and on

17th January, 1845, a final decree was rendered against him by said court, in favor of complainant as his successor, for \$1,982 69; that an execution was duly issued on this decree, on the 22d February, 1845, and was duly returned "no property found"; that executions were then duly issued on said decree against said Price and the sureties on his official bond, who were said Thomas R. Williams and one Isaac Haynes; that under these executions, the amount of said decree, with interest, amounting to \$2,054 11, was made from a sale of property belonging to said Williams, and this sum was received by complainant, as administrator of said estate; that in February, 1847, complainant filed his accounts and vouchers for a final settlement of his administration on said estate, and on the 5th April, 1847, a final settlement thereof was made with said court; that pursuant to this decree, complainant paid over to the several distributees of said estate, some of whom were insolvent, and others non-residents, their respective distributive shares of said estate as ascertained by said decree.

The bill further alleges, that in November, 1847, without any notice thereof having been given to complainant previous to his said settlement, said Williams sued out a writ of error on the decree which complainant had obtained against said Price, and took said cause to the Supreme Court, where, on the 11th February, 1848, said decree was reversed, and the cause remanded for further proceedings; that on the 28th March, 1848, said Williams instituted suit against complainant for the recovery of the money which had been collected under execution against him as aforesaid, and on the 25th April, 1853, succeeded in obtaining a judgment against him for the sum of \$3,554 97, besides costs of suit; that on the 22d August, 1850, complainant commenced proceedings anew in said Orphans' Court, against said Price, to compel a final settlement of his administration on said estate, and on the second Monday in November, 1850, obtained another decree against him, as administrator of said Burns, for \$1,982 69; that an execution was duly issued on this decree, on 16th March, 1851, and was duly returned "no property found." The bill alleges, also, that on the trial of said action at law, brought by Williams as aforesaid, complainant endeavored to make available as a defence the liability of said Williams to

him, but the court decided that it was not a good defence at law ; that said Williams was indemnified by Price, either in whole or in part, as his surety ; that Price is, and has been for several years, utterly insolvent ; and that Haynes, the other surety on his official bond, is dead, and his estate insolvent.

The prayer of the bill is for an injunction of the judgment at law, and for general relief.

The chancellor dismissed the bill for want of equity, and his decree is now assigned for error.

WHITE & PARSONS, for the appellant :

The general proposition is not denied, that the rule in regard to set-off is the same in equity as at law, unless there be some peculiar circumstance, or natural equity, growing out of the condition of the parties or their mutual transactions, which would require the interposition of a court of equity. and which a court of law could not regard ; also, that equity, following the law, will not allow a set-off of a joint against a separate debt, or of debts accruing in different rights.—Story's Equity, §§ 1434, 1437; *Cave v. Webb*, 22 Ala. 583; 8 *ib.* 206. But special circumstances may occur, creating an equity which will justify such an interposition ; and the facts shown in this record present a strong case for its interference.

The bill alleges, in the first place, that the complainant has paid over the money to the several distributees of the estate, some of whom are insolvent, and some non-residents ; and if the money is now recovered from him, he is remitted to his action against insolvent persons. This presents the very state of facts, upon which, when this case was last here from the court of law, this court declined to express an opinion, but left an open question.—22 Ala. 432.

Again ; the reversal of the decree under which the money was collected, restored the parties to the same condition in which they were before its rendition.—18 Ala. 407. When the appellant again collects the money from Williams, the distributees will have the right to call him to another final settlement and distribution ; and having collected the money as administrator, he will be estopped from denying that he received it in that character. When he sets up the former

distribution, he will be met by the argument, that the reversed decree is mere waste paper, and that there is nothing to protect them against liability to him for the money paid under it. Equity, it is said, delights to prevent a multiplicity of suits, and frequently entertains bills for and against parties, between whom there exists no connection whatever except a community of interest.—2 Ala. 609.

Is there not something like *natural equity* in this peculiar condition of things, which appeals strongly to the powers of a court of equity? "Natural equity says, that cross demands should compensate each other, by deducting the less sum from the greater, and that the difference only is justly due; and if there is a connection between the demands, equity acts upon it, and allows a set-off under peculiar circumstances."—Story's Equity, § 1434. In this case, there is a clear and well-ascertained connection, for the two demands spring out of the same estate; and there is certainly no equity in allowing the collection of funds from Simmons, which the court would, the next minute, order to be refunded to him by the party collecting them.—Nelson v. Dunn, 15 Ala. 516; Leeds v. Marine Insurance Co., 6 Wheat. 565.

The fact that Simmons has paid off the distributees, clearly shows his right to retain this money, *ex æquo et bono*.—Dupuy v. Roebuck, 7 Ala. 486; Duncan v. Ware, 5 Stew. & P. 119; Meredith v. Richardson, 10 Ala. 828; 1 Har. & John. 408.

The allegation that Williams has been indemnified, either wholly or partially, by his principal, who is insolvent, is another strong ground for the interposition of equity; for it is well settled, in such case, that the creditor may come into equity, to subject the property to the payment of his demand. If the creditor may go into equity to reach the specific property, why may he not invoke its aid to show that the surety ought not to recover this money, because his principal has placed funds in his hands to pay this debt?

JOHN T. MORGAN, *contra*, contended, among other things, that if Williams was in any way liable to Simmons, the debt was not such an one as would form the subject-matter of a set-off in equity, because,—

1. The demand is a purely legal demand, and would intro-



duce into a court of equity the subject-matter of a suit at law; and the defences of *non est factum*, release, &c., would come up.

2. There is no mutuality between the debts; the debt to Williams being due from Simmons personally, while that owing to Simmons (if any at all) is due him as administrator of Burns.—*Murray v. Toland*, 3 Johns. Ch. 569; *Dale v. Cook*, 4 *ib.* 11; *Gayle v. Luttrell*, 1 Y. & Jerv. 180; *Lamme v. Saunders*, 1 Mon. 267.

3. If the demands were mutual, there would still be no equity in favor of Simmons as against Williams, and therefore no cause for a resort to chancery.—*Cave v. Webb*, 22 Ala. 583; *Wathen's Executor v. Chamberlain*, 8 Dana, 164; *Stewart & Co. v. Chamberlain*, 6 *ib.* 32.

GOLDTHWAITE, J.—At the common law, where there were mutual and disconnected demands, there could be no set-off, but each party was compelled to sue; and equity, in such cases, followed the law, unless there was a natural equity which would authorize the interposition of that court.—*Story's Eq.*, §§ 1433, 1434. The “natural equity”, which would justify the interference of a court of chancery, was held to exist in cases of mutual credits—that is, where the one debt was contracted on the credit of the other, (*Story's Eq.*, § 1435); or where some other circumstance, such as insolvency, intervened, which might result in the loss of the debt unless it was discounted.—*Tuscumbia Railroad Co. v. Rhodes*, 8 Ala. 206. But there is no case that we have found, which goes to the length of holding that the mere existence of mutual and independent debts would allow them to be set off in equity. If that was so, then, as was said by Lord Mansfield, in *Green v. Farmer*, 4 Burr. 2220, “They would stop the course of the law, in all cases where there was a mutual demand.”

In the present case, there was no mutual credit; on the contrary, the demands are entirely distinct and independent of each other. The one is founded on the bond executed by Williams as the surety of Price, and is due to Simmons in his representative character, as the administrator *de bonis non* of Burns; and the other is an individual liability of Simmons, based upon the collection of money on a decree which was afterwards reversed. It is true, that the decree on which the

money was collected, was rendered in favor of Simmons against Price, on the final settlement of his accounts as the former administrator of Burns; and the bill alleges that, subsequently to the payment of this money by Williams, and during the pendency of the suit to recover it back, another decree was rendered in favor of Simmons against Price; and that the liability of Williams for the payment of this decree was perfected by the issue of an execution, and return of no property, against his principal, Price. But, if it be conceded that these proceedings had the effect of rendering Williams liable on his bond for the amount of the last decree, we do not see that such liability would warrant the interference of equity. To do this, the demands must be connected in the way of mutual credits—there must be circumstances from which it can be inferred that the one debt was contracted on the credit of the other, or that there was an agreement between the parties that the one should be discounted from the other, (*Jeffs v. Wood*, 2 P. Wms. 128; *Story's Eq.*, § 1435); or there must be some other intervening equity, which would render the interposition of that court necessary for the protection of the demand sought to be set off.—*Tuscumbia Railroad Co. v. Rhodes*, *supra*.

*Roebuck v. Dupuy*, 7 Ala. 484, simply asserts, that where one pays a judgment, for a debt which he actually owes at the time of payment, and which could be recovered in the action brought, it is, in effect, but the payment of the debt, and he could not recover it back if the judgment was reversed: but neither the principle of that case, nor that of *Meredith v. Richardson*, 10 Ala. 828, is applicable to the case at bar, for the reason that there was no debt or liability against Williams at the time he paid the money on the first decree, and the payment of it by him, could not, therefore, properly be referred to a future contingent demand. In other words, the mere fact that Williams afterwards became indebted to Simmons, did not authorize the latter to set off that debt in equity against a demand previously existing against him in favor of Williams.

In relation to the other grounds of equity, which have been noticed by the appellant, it is only necessary to observe, that if he has paid over the money which he wrongfully collected

out of Williams, to insolvent distributees, it can confer no rights as against the party from whom the amount was collected. He can reimburse himself out of the decree, on which he alleges Williams is responsible. That Williams has been indemnified by Price, does not affect the present suit, as its object, and the special relief prayed for, is to set off the claim of the appellant against the judgment Williams has recovered against him. The rule is, that under the prayer for general relief, when the bill is not filed in a double aspect, no relief can be granted, unless consistent with that specifically prayed for.—*Thomason v. Smithson*, 7 Port. 144; *Pleasants v. Glasscock*, 1 Sm. & M. Ch. 17; *Story's Eq. Pl.*, § 42; *Dan. Ch. Pr.* 435. To claim the right of set-off against a surety, and to insist that he should give up his indemnity, are wholly inconsistent.

Decree affirmed; the appellant paying the costs of this court.

CHILTON, C. J., and RICE, J., having been of counsel in this case before their election to the bench, the cause was heard before GOLDTHWAITE, J., alone; and he being of opinion that there was no error in the record, no statutory court was summoned.

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### WATSON vs. HUTTO.

[MOTION TO QUASH EXECUTION AND ENTER SATISFACTION OF DECREE.]

1. *Conclusiveness of final decree of probate court.*—A decree of the probate court, rendered on the final settlement of an estate, ascertaining and adjudging to each distributee his share of the estate, is as final and conclusive as a decree in chancery or a judgment at law; and after the expiration of the term at which it is rendered, a motion to enter satisfaction, and to quash an execution issued on it, upon grounds which go only to matters behind the decree, cannot be granted, although such matters may be true in point of fact.

APPEAL from the Court of Probate of Henry.

THE record in this case shows these facts : On the final settlement of the estate of David Watson, by Solomon Hutto his administrator, on the 10th August, 1853, a decree was rendered in favor of Mrs. Elizabeth Watson, the widow of the intestate, for \$514 15, as her distributive share of the estate ; but as this decree is nowhere set out in the record, its terms cannot be stated. On the 10th February, 1854, an execution was issued on this decree, against the said administrator, and was levied on a slave as his property. The defendant, in vacation, before the return term of the execution, moved the court to quash the execution, and to enter satisfaction of the decree, "on the ground that the same has been fully paid and satisfied, as per plaintiff's receipt." On the trial of this motion, the plaintiff therein offered in evidence, after proving its execution, a writing under seal, signed by Mrs. Elizabeth Watson, and dated January 17, 1852, which was in these words :—

"This is to certify, that I, Elizabeth Watson, wife of David Watson, sen., has this day received full and final compensation from Solomon Hutto, guardian of the said David Watson ; and further aver, that I will never ask, sue, plead or implead any asset from the said Watson's estate. And I do hereby relinquish all right and title to any claim that I may have against said estate, unto the said Hutto, &c.; and this is a full and final receipt from me forever, and shall be considered my own voluntary act and doing. Given under my hand and seal", &c.

It was proved that the consideration of this instrument was \$350, which was paid at the time of its execution, part in money and part in notes. There was other evidence in relation to matters connected with this writing, but it is unnecessary to state them. On all the evidence adduced, which is set out in the bill of exceptions, "the court decided the contract binding, and sustained the motion to quash the execution." To this ruling of the court, with others, the defendant in the motion excepted, and it is here assigned for error.

JAMES L. PUGH, for the appellant.

NAT. HARRIS, *contra*.



RICE, J.—The decree of the probate court, on the final settlement of the estate, adjudging to the appellant her distributive share, is as conclusive as a decree in chancery, or a judgment of a circuit court. Where the defendant in such decree, *after the expiration of the term at which it was rendered*, makes a motion to enter satisfaction of it, and to quash the execution issued under it, upon grounds which go *only to matters behind the decree*, the motion cannot be granted, although such grounds may be true in point of fact.—Slatter v. Glover, 14 Ala. R. 648; Marshal v. Candler, 21 *ib.* 490; Burt v. Hughes, 11 *ib.* 571; Powell v. Washington, 15 *ib.* 803; Bon-durant v. Thompson, 15 *ib.* 202.

We deem it unnecessary to decide any other question presented by the record, as what we have above decided will likely put an end to the motion. For the error of the court below in granting the motion, its decree is reversed, and the cause remanded.

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### MAY & BELL vs. MILLER & CO.

[ACTION UNDER CODE AGAINST OWNERS OF STEAMBOAT, ON BILL OF EXCHANGE  
DRAWN BY CAPTAIN, FOR REPAIRS.]

1. *Bill not admissible under common counts, unless proved.*—A bill of exchange is not admissible evidence under the common counts, unless its execution is proved.
2. *Variance between instrument declared on and that offered in evidence.*—Whatever may be the effect of the provisions of the Code, on objection raised to the complaint, in dispensing with the necessity for the same technical precision which was formerly required in a declaration; yet where the instrument offered in evidence varies from that described in the complaint, the variance renders it inadmissible.
3. *Drawer's name must be inserted or subscribed.*—To hold one liable as the drawer of a bill, his name must be either inserted in it or subscribed to it.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. McKINSTRY.

THIS action was brought by J. C. Miller & Co. against James T. May and Bushrod W. Bell, and the complaint was as follows:—

“James C. Miller and William Miller, partners under the firm of J. C. Miller & Co., claim of James T. May and Bushrod W. Bell the sum of \$900, for work and labor performed on the steamboat Messenger, and for materials furnished on the same, of which boat said defendants were the owners, and said work done and materials furnished by plaintiffs at their request; and plaintiffs claim interest thereon from November 21, 1852.

“The plaintiffs claim of the defendants, also, the sum of \$900, on an account stated between the plaintiffs and defendants on November the 21st, 1852; which sum, and interest thereon, are now due, and the property of the plaintiffs.

“The plaintiffs claim of the defendants, also, the sum of \$900, due to them by a draft, or bill of exchange, drawn by said Bell on behalf of himself and said May, on J. J. Cox, Mobile, of which acceptance was refused; said bill bearing date November 21st, 1852, drawn payable at six months after date, in favor of the plaintiffs, and protested for non-acceptance on December 20th, 1852; and plaintiffs claim interest and damages, pursuant to law, on this bill, which is their property.”

The defendants filed but one plea—to-wit:

“The defendants state, as a plea to the 1st, 2d, and 3d counts of the complaint, that the plaintiffs undertook and promised to paint and do the glazing of the steamboat Messenger in a workmanlike manner, and in all respects similar to the same sort of work done by said plaintiffs for and on the steamboat Magnolia, and that it was in consideration of the said promises that the defendants promised to pay the said moneys mentioned in said complaint, and that said plaintiffs did not paint and glaze said steamboat Messenger in accordance with their said promises, or perform their said promises; and this the defendants are ready to verify, and of this they put themselves on the country.”

On the trial, the plaintiffs offered in evidence a bill of exchange, with the protest thereof, of which the following is a copy:

"Exchange for \$900. Louisville, Ky., November 21, 1852.

"(The drawers and endorsers waive notice of non-acceptance and non-payment of this bill, and protest to be evidence of presentment.)

"Six months after date of this our first of exchange (second of same tenor and date unpaid), pay to the order of J. C. Miller & Co., for painting, glazing, &c., nine hundred dollars, value received, and charge the same to account of steamer Messenger and owners.

"To Capt. J. J. Cox,                    }  
  at Mobile, Ala.                    }                   B. W. BELL, Capt."

Endorsed on the back "J. C. Miller & Co."

"The plaintiffs offered no other testimony, and closed their case. To the reading of said bill of exchange in evidence, and the protest thereof, defendants, by their counsel, objected, on the ground that it varied materially from that described in the complaint, and that neither the bill nor protest so offered showed any liability against the defendant May; and asked the court to exclude the same from the jury. But the court overruled the objection, and permitted the said bill and protest to go to the jury; and the court instructed the jury, that if they believed the evidence, it was sufficient to authorize them to find for the plaintiffs, for the amount of the bill, ten per cent. damages, interest, and protest. To all which defendants excepted", and which they now assign for error.

J. C. BOLLING assigned errors for appellants.

GEO. N. STEWART, *contra*, submitted a brief for appellees.

CHILTON, C. J.—There was no proof of the execution of the instrument, and consequently no question is raised as to its admissibility under the common counts. It must, therefore, be admissible under the allegations contained in the special count, or it was improperly received.

The counsel for the appellees seems to think, that since the Code, the same precision is not required in a complaint as was formerly necessary in declarations, and that it is sufficient if reasonable notice be afforded to the defendant of what he is called upon to answer; that since the defendant has the right to demand of the plaintiff the exhibition of the

instrument declared on, so as to enable him to make his defence, the necessity for specific averments to prevent surprise does not exist. However this may be upon objection raised to the complaint, we are of opinion, nevertheless, that where the instrument produced in evidence varies from that described in the complaint, it is inadmissible; and no inconvenience can result from adhering to this rule, since ample provision is made for amending the complaint, so as to avoid the variance.

The complaint is that Bell made the note declared on, not for himself alone, but for and on behalf of himself and May. It is described as the bill of Bell and May, that is, in legal effect. But the bill produced is not the bill of Bell and May. The name of the latter nowhere appears on it; nor is it even averred in this count that he was one of the owners of the steamboat Messenger, on whose account, without naming them, the bill appears to be drawn by Bell as captain. It is very clear, we think, that the bill produced is not, in legal effect, the one declared on; and it was, therefore, improperly admitted.

Whether the bill is such as would, under any averment, authorize a recovery against both Bell and May, the latter being *prima facie* a total stranger to it, and Bell drawing it as captain on account of the steamboat Messenger and owners, is a question not now before us, and consequently we leave it undecided. It is clear that the name of the drawer must be inserted, or subscribed, to hold him liable.—Smith's Mercantile Law, (ed. of 1854) p. 277; Fenn v. Harrison, 2 Durn. & East, 177.

As the court erred in admitting the bill as evidence under the averments in the complaint, and in charging that the proof, if believed by the jury, authorized them in finding for the plaintiffs, the judgment must be reversed, and the cause remanded.



## NORRIS vs. NORRIS.

[BILL IN EQUITY FOR DIVORCE—MOTION TO DISSOLVE INJUNCTION.]

1. *Injunction dissolved for want of equity, and bill retained for other relief.*—Whenever the allegations of the bill are not sufficient to warrant the interference of the court by injunction, the injunction may properly be dissolved for want of equity, although the bill may be retained for other relief.
2. *Allegation of wife's fear, without stating facts, insufficient to enjoin husband's removal of his property.*—Where the wife files a bill against her husband for a divorce *a vinculo*, and alleges “that she has just cause to fear, and in fact does fear, that upon the filing and service of this bill he will remove or dispose of his whole property”, but does not state the facts which cause her fears, the allegations are not sufficient to authorize an injunction to prevent the removal of the defendant's property.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Mrs. Margaret F. Norris, suing by her next friend, James M. Lenoir, against her husband, James R. Norris; praying for a divorce *a vinculo matrimonii*, alimony out of her husband's estate, and an injunction to prevent the removal of his property out of the jurisdiction of the court. The prayer for an injunction is predicated on the following allegation in the bill: “And your oratrix further shows, that she has just cause to fear, and in fact does fear, that the said James R. Norris, upon the filing and service of this bill, the whole of his property being moveable and of easy transportation and disposition, will remove or dispose of the same, unless restrained from so doing by the order of this honorable court.”

On the filing of this bill, an injunction was awarded by the Hon. Nat. Cook; and on the coming in of the answer, the defendant moved to dissolve the injunction. The chancellor, on the hearing of this motion, dissolved the injunction for want of equity, but retained the cause for further proceedings; and his decree is now assigned for error.

J. H. CAMPBELL, for the appellant.

LAPSLEY & BYRD, *contra*.

GOLDTHWAITE, J.—Whenever the facts alleged in the bill are not sufficient to warrant the interference of the court by injunction, the injunction may properly be dissolved for want of equity, so far as it is concerned, although it may be necessary to retain the bill with a view to other relief. *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio Railroad Co.*, 4 Gill & John. 7. This is the case here. The allegations of the bill as to the matters which, if proved, would be a good cause for a divorce, are not of themselves a sufficient ground for an injunction to prevent the defendant from removing or disposing of his property. We do not say they might not be looked at by the court to support other allegations, which, standing alone, would not be sufficient. In the present case, however, the complainant simply alleges that she has just cause to fear, and does fear, that on the filing of the bill the property of the defendant will be removed; but upon what circumstances this fear is founded, we are entirely in the dark. She should have gone further, and alleged the facts which gave rise to these fears, in order that the chancellor might see there was some ground for them; but she does not even refer them to the conduct of the defendant, which forms the gravamen of her bill. Her fears, for aught we know, may be entirely groundless. It would, as the chancellor said, be a grievance, if a man's property could be tied up upon so loose an allegation as this.

The decree dissolving the injunction must be affirmed, and the next friend must pay the costs of the appeal.

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### HARRIS vs. BELL ET AL.

[TROVER FOR CONVERSION OF A SLAVE.]

1. *Distinction between positive and negative testimony.*—Where one witness swears that, in a certain conversation, he heard a party use particular language, while another, who was present at the same time, testifies that he did not hear it, the law gives more weight to the positive than to the negative testi-

mony; but this principle does not apply, where one witness testifies that the conversation had reference to a particular slave in controversy, while the other testifies that it did not relate to her, but to another slave, and each swears that he heard and remembers the whole conversation.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. B. W. HUNTINGTON.

THIS action was brought by the appellant, Norfleet T. Harris, against John W. Bell and Robert J. Allison, to recover damages for the conversion of a slave, named Mary, who, with her husband, was hired by plaintiff to one Maury, for the year 1852. Maury re-hired the slaves to Allison, for himself and Bell, and the woman died in Allison's possession before the expiration of the year. It is unnecessary to notice the several points presented by the bill of exceptions, since the judgment of the court below is here reversed, on account of an erroneous charge, which, with the facts on which it was predicated, will be readily understood from the opinion.

ROBERT H. SMITH, for the appellant.

JOHN F. VARY, *contra*.

RICE, J.—One witness testified, that on a specified occasion, he heard the plaintiff say, he had told the woman Mary (the slave in controversy in this suit) to go back to Bell's, and stay there as long as Bell treated her well, and if he mistreated her, to come to him; and that he was certain the conversation applied to the woman. Another witness testified, that he was present on the same occasion, and remembered the whole conversation; and that plaintiff said, he had told the negro man (who was not in controversy in this suit) to go back to Allison's and stay as long as he was treated well, and if misused, to return to him; and that he was certain the conversation related to the man, and that no such conversation took place in reference to the woman.

In relation to the testimony of these two witnesses, the court charged the jury as follows: "When a witness swears affirmatively that he heard a party use certain language in a conversation, and another witness, present at the time, swears he did not hear it, or *that it was not used*, other things being

equal, the law gives the more weight to the affirmative testimony."

This charge must be construed in connection with the testimony, to which alone it could be applied.—*Berry v. Hardman*, 12 Ala. R. 604. And if, when thus construed, it is erroneous, it is ground of reversal.—*Carey v. Hughes*, 17 Ala. R. 388.

The principle laid down in the authorities, in relation to the superiority of positive testimony to that which is negative, has no application to the testimony of the two witnesses hereinabove set forth. That principle would be applicable, if one had sworn that he heard the plaintiff, in the particular conversation, use the language in reference to Mary, and the other had sworn merely that he was present, but did not hear any language as to Mary.—1 Starkie on Ev. 516, 517. But the latter witness, instead of swearing merely that he did not hear any such language as to Mary, swears that he remembered the whole conversation, and that no such conversation took place in reference to Mary. Although his evidence is of a negative nature, yet the authorities show, that such evidence, under particular circumstances, may not only be equal, but superior, to positive evidence. His evidence cannot be reconciled with that of the other witness, without violence and constraint. And it was an error in the court below to give a charge which necessarily induced the jury to believe that—"other things being equal"—"*the law*" gave more weight to the testimony of the witness which the court called "affirmative", than it did to the testimony of the other witness, which, although negative in its nature, was positive. When the testimony of two witnesses is such as above set forth, "*the law*" does not give a preference to the testimony of either witness, "other things being equal."—1 Starkie on Ev. 517, 518.

There are cases, where the evidence on both sides is precisely balanced. In such a case, no conclusion can be attained. Where the testimony is precisely balanced upon a single fact, then it is important to ascertain, whether the burden of proving that fact is on the plaintiff, or on the defendant; for the party on whom the burden of proving it rests,



must lose the benefit of it, if the testimony in relation to it is precisely balanced.—*Lindsey v. Perry*, 1 Ala. R. 203.

The other questions presented by the record may not arise on another trial, and we shall not now decide them. For the error in the charge above set forth, the judgment is reversed, and the cause remanded.

### THOMAS vs. HENDERSON.

[TRIAL OF THE RIGHT OF PROPERTY IN A SLAVE BETWEEN PLAINTIFF IN EXECUTION AND DAUGHTER OF DEFENDANT IN EXECUTION.]

1. *Endorsement of levy on fi. fa. admissible evidence against claimant.*—The sheriff's endorsement on a *fi. fa.* of his levy is admissible evidence against the claimant, on a trial of the right of property, for the purpose of showing its levy on the slave in controversy.
2. *Facts tending to show defendant's adverse possession, at or before levy, admissible evidence for plaintiff.*—That the defendant in execution resided on, and claimed as his own, the plantation on which the slave in controversy worked; that his son, who was controlling the slave avowedly as his overseer, and his daughter, who was the claimant, resided on the plantation with him at that time; and that said defendant, while the slave was being thus controlled, declared that his son was his overseer,—are facts tending to prove the defendant's possession under claim of ownership, and are admissible evidence to show adverse possession.
3. *Erroneous admission of evidence cured by instructing jury to disregard it.*—If illegal evidence is admitted for a single specified purpose, and the court afterwards instructs the jury "that that question is not before them and they are not to regard any proof on that subject," no injury can possibly result from the error.
4. *General objection to evidence, of which part is legal.*—A general objection to evidence as a whole, when a part of it is legal, may be overruled.
5. *Declarations of ownership by one in possession admissible as part of res gestæ.*—The declarations of the defendant in execution to the sheriff, when the latter was about to levy an execution on another slave as the property of his son—"that he might go contented without her, that he would never get a negro there on his son's account, and that every negro there belonged to himself"—when it is shown that the slave in controversy was then in his possession, are admissible evidence as part of the *res gestæ*, being explanatory of his possession.
6. *Waiver of objection to secondary evidence though primary is not produced.*—When

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a party elicits, on cross-examination of a witness, parol evidence of judicial proceedings, which constitutes new matter and is directly responsive to the interrogatory, and afterwards declines to read the answers to the cross-interrogatories on the trial, he cannot, when his adversary offers to read them, raise the objection that the record was not produced nor its absence accounted for; and that the evidence thus elicited is also incidentally stated by the witness in answer to a direct interrogatory, does not affect the principle.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. JOHN E. MOORE.

TRIAL OF THE RIGHT OF PROPERTY in a slave named Jim, between Thomas Henderson, plaintiff in execution, and Mary Thomas, daughter of Athanasius Thomas, the defendant in execution, as claimant. The plaintiff's judgment was for \$432, besides costs, and was rendered on the 1st November, 1847, in the Circuit Court of Benton county; and the execution was issued on the 17th November, and levied on the 6th December, 1847. The trial was had at the October term, 1854. Numerous exceptions were reserved to the rulings of the primary court during the progress of the trial, but it is only necessary to state those which are decided by this court.

The plaintiff offered his execution in evidence, and proved the handwriting of the sheriff who made the levy under it; and then offered to read the sheriff's endorsement on the execution of his levy, "as evidence that the negro Jim in controversy had been levied upon under said execution." The claimant objected to this, "because said endorsement was *res inter alios*, and was not evidence against the claimant in this action; but the court admitted it for the purpose of showing a levy on said slave, but for no other purpose, and the claimant excepted."

"The plaintiff introduced a witness, who stated that, in 1844, Athanasius Thomas, the defendant in execution, and the claimant, who was his daughter, and James Thomas, her brother, lived together in the same house, and upon the same plantation, which was claimed and controlled by said Atha. Thomas; that the negro in controversy, with others, worked upon the said plantation; and that said James Thomas, during that year, openly controlled the said negro, with the others, as the overseer of said Atha. On being asked by the

claimant how he knew this fact, he said, that he knew it by seeing him managing and controlling said negroes, and by hearing said Atha. and James both say, at the time, that he was (acting) as the overseer of said Atha. The claimant then moved the court to exclude said evidence from the jury; and thereupon the plaintiff stated, that he expected to show an adverse possession of the slave in controversy by said Atha. Thomas, under a claim of title, within the knowledge of the claimant, for a length of time sufficient to render said slave liable for his debts; and that he offered this proof as a circumstance to show such adverse claim and possession, and that the same was within the claimant's knowledge. And plaintiff having introduced proof tending to show a possession and claim of said slave by said Atha. Thomas, hostile and notorious, the court admitted said evidence in that connection, and for that purpose, but for no other; and the claimant excepted to its admission." The bill of exceptions afterwards states, that "When the court came to charge the jury, they were told that the plaintiff had failed to make out any adverse possession, and that that question was therefore not before them, and they were not to regard any proof on this subject."

The plaintiff offered in evidence the deposition of one Darling Allen, taken on interrogatories and cross-interrogatories. In answer to the tenth direct interrogatory, this witness stated, among other things, that he knew said Atha. Thomas and his family previous to their removal from Fairfield district, South Carolina, which took place some time in the early part of the year 1842; that the boy Jim was once levied on by the sheriff of Fairfield, under an execution against Atha. Thomas, and was taken to the court-house; that this occurred some time in 1841; "that in the same year, the sheriff came to said Thomas, witness being present, with a *fi. fa.* against James Thomas; that the sheriff wanted to levy on Jenny, as the property of James; and that the old man told him, '*he might go contented without her, that he never would get a negro there on James' account, and that every negro there belonged to him*' (said Atha.), or words to that effect." The claimant objected to so much of this answer "as related to what Atha. Thomas said", as being irrelevant and illegal;

but the court admitted it, as being explanatory of the defendant's possession of the slave Jim, and the claimant excepted.

One of the cross-interrogatories propounded to this witness was in these words: "State, also, if said Atha. Thomas had not been notoriously insolvent for many years before he removed from South Carolina to this State; also, if Atha. Thomas, at any time, was under arrest for debt; and if so, and if more than once, state the first date at which he was so under arrest, and the manner of his discharge, if you know it." The witness answered the interrogatory as follows: "Witness never knew that Atha. was insolvent; he was once, and only once that witness knows, under arrest for debt; witness thinks it was at the suit of one Thomas Carson; that Atha. was *ca-saed*, and gave Mr. Thomas Henderson as his security, and afterwards Mr. Henderson had the debt to pay; this was, perhaps, five or six months before Atha. Thomas left." The claimant having declined to read the answers of this witness to his cross-interrogatories, the same were read in evidence by the plaintiff. The claimant objected to so much of the above answer, "as stated that Atha. Thomas was *ca-saed*, and gave Thomas Henderson as his security, who afterwards had the debt to pay, as being illegal and incompetent evidence. The plaintiff then stated to the court, that he would show that the debt so paid as the surety of said Thomas was the foundation of the judgment on which the execution in this case issued, and that he offered the evidence in that connection to show the existence of this debt before the sale to the claimant; and in that point of view, and upon that statement, the court admitted the evidence, and the claimant excepted. The plaintiff afterwards introduced proof, tending to show that the debt, upon which the judgment in this case is founded, did originate in said transaction."

These rulings of the court, with others which will be readily understood from the opinion, are now assigned for error.

ALEX. WHITE and G. C. WHATLEY, for the appellant :

The sheriff's endorsement of his levy on the execution against Athanasius Thomas ought not to have been admitted in evidence against the claimant in this suit, who was neither a party nor a privy to it. That it was offered to prove only



one fact, does not avoid the difficulty. That fact was extrinsic of the record—namely, “as evidence that the negro in controversy had been levied on under said execution”; or, in other words, for the purpose of identifying the slave in controversy with the one levied on, and thus proving a fact outside of the record in order to make legal the proof of a levy, which otherwise is incompetent. The recitals, admitting the execution to be a part of the record, are not evidence.—*Snodgrass v. Decatur Bank*, 25 Ala. 161.

The declarations of James Thomas were clearly improper evidence, nor was the error in admitting them cured by the instructions afterwards given to the jury. The court should have told the jury, that these declarations were excluded from their consideration for every purpose whatever. It cannot be presumed that the jury understood the meaning of the technical term ‘adverse possession’, about which the courts can scarcely agree. The evidence was well calculated to mislead the jury, and the most explicit charge would scarcely have effaced its impression from their mind.—*Florey v. Florey*, 24 Ala. 246; *Carlisle v. Hunley*, 15 *ib.* 623.

The declarations of Athanasius Thomas, as sworn to by the witness Allen in answer to the tenth interrogatory, were irrelevant. They related entirely to another slave, and it is not shown that the slave here in controversy was even mentioned at the time.

The answer of the witness Crosby to the eighth interrogatory, was illegal evidence, and ought to have been excluded on motion. Where written evidence exists of the fact sought to be proved, it must be produced, or its loss accounted for, before resort can be had to secondary evidence.—*McDade v. Mead*, 18 Ala. 219; *Smith v. Armstead*, 7 *ib.* 702; *Smelser v. Drane*, 19 *ib.* 245; *Ware v. Robinson*, 18 *ib.* 105; *Boone v. Dyke*, 3 Mon. 529; *Cope v. Arberry*, 2 J. J. Mar. 296; *Rex v. Inhabitants of Padstow*, 4 Barn. & Ad. 208; *Roberts v. Tennell*, 3 Mon. 247; *Jenner v. Joliffe*, 6 Johns. 9; *Hasbrouck v. Baker*, 10 *ib.* 248; *Cowen & Hill’s Notes to Phillips’ Evidence*, vol. 2, pt. 1, p. 541; *ib.* pt. 2, p. 285; 2 Ad. & El. 35.

JAMES B. MARTIN, *contra*, made these points:—

1. The sheriff’s return on the plaintiff’s execution, show-

ing the levy on the slave in controversy, was read in evidence, for the sole purpose of proving the levy, and was confined to that purpose by the court. That it was admissible for that purpose, see *Henderson v. Branch Bank at Montgomery*, 11 Ala. 855; *Lanier v. Branch Bank at Montgomery*, 18 *ib.* 625; *Garrett v. Rhea*, 9 *ib.* 134.

2. The evidence showing the possession of Athanasius Thomas, was held competent in another branch of this same case.—*Degraffenreid v. Thomas*, 17 Ala. 602. The legality of the latter portion of the statement of the witness, is an immaterial question, since the objection was general.—*Melton v. Troutman*, 15 Ala. 535; *Hatchett v. Gibson*, *ib.* 587; same parties, 24 *ib.* 201; *Newton v. Jackson*, 23 *ib.* 335. But, even if the whole of this evidence was illegal, the error in admitting it was cured by its subsequent withdrawal from the jury under the charge of the court. If language more direct, positive and expressive could have been used to exclude it from the jury, the claimant ought to have suggested it at the time. *Florey v. Florey*, 24 Ala. 241; *The State v. Givens*, 5 *ib.* 747; *Degraffenreid v. Thomas*, 14 *ib.* 681.

3. The objection to that portion of Crosby's deposition to which exception was reserved, cannot be sustained; because, in the first place, it is in reply to a cross-interrogatory, which called directly and particularly for it.—*Stewart v. Hood*, 10 Ala. 600; *Olds v. Powell*, 7 *ib.* 652; *Rogers v. Wilson*, Minor's R. 407. This was not a cross-examination upon any matter called for by the plaintiff, but an independent question by which the defendant sought to elicit evidence beneficial to himself; and his experiment having failed, he now asks that the testimony may not be received against him. But the evidence itself is not obnoxious to the objection urged against it. There was no attempt to prove the contents of the *ca. sa.* or judgment, but simply the fact that an arrest had been made; and this fact it was competent to prove by parol.—*Smith v. Armstead*, 7 Ala. 702; *Southwick v. Hayden*, 7 Cowen's R. 334; *Heckert v. Haine*, 6 Binn. 16; *Wishart v. Downey*, 15 Serg. & R. 77; 5 Day's (Conn.) R. 298; 11 Sm. & Mar. 9; *Andrews & Bro. v. Jones*, 10 Ala. 461; *Hogan & Co. v. Reynolds*, 8 *ib.* 60.

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CHILTON, C. J.—1. The cases of Garrett v. Rhea, 9 Ala. R. 134, Henderson v. The Branch Bank at Montgomery, 11 *ib.* 855, and Lanier v. The Branch Bank at Montgomery, 18 *ib.* 625, show that the court committed no error in permitting the endorsement by the sheriff of a levy upon the property in question to be read to the jury. This return is a part of the record, and the claimant estops herself from saying there is no levy, by putting in her claim, giving bond, &c.—Henderson v. Br. Bk. Montgomery, *supra*.

2. There can be no doubt of the right of the plaintiff in the execution to show that the property levied upon, either before or at the time of the levy, was in the possession of the defendant in the execution, possession being *prima facie* evidence of title. The facts, that Atha. Thomas, the defendant in the execution, resided on and claimed as his own the plantation on which the slave in controversy worked,—that the claimant, who was his daughter, and James, who was controlling the slave avowedly as the overseer of his father, resided on said plantation with him, and that the father while the slave was being thus controlled, declared that James was his overseer,—all tended to establish the possession of the father under claim of ownership, and were certainly admissible as evidence to show an adverse possession. For this purpose alone this proof was distinctly allowed by the court; and the proof failing to show a possession for such a length of time as could ripen into a title, the court instructed the jury, “that the plaintiff had failed to make out any adverse possession, and that that question was therefore not before them, and they were not to regard any proof on this subject.”

3. We cannot perceive how the jury could have been misled by the proof, even if it be conceded to be improper. The court expressly limited its admission to one plainly defined purpose, and afterwards told the jury they should disregard it as respects that purpose, inasmuch as there was a failure of suppletory proof to establish such adverse possession.—15 Ala. R. 623. Assuming that the jury were men of ordinary sense and apprehension, no injury could possibly have resulted from such proof.—Florey's Ex'rs v. Florey, 24 Ala. R. 241; 17 *ib.* 681–688.

4. But if James Thomas' declarations were improper, yet a

portion of the proof was clearly competent, and the objection was general, going to it as a whole. It might therefore, for this reason, have been properly overruled.—15 Ala. R. 535; 23 *ib.* 335.

5. What Athanasius Thomas said to the sheriff, when he was about to levy an execution upon the slave Jenny, as the property of James Thomas—to-wit, “that he might go contented without her,—that he never would get a negro there on James’ account—that every negro there belonged to him, the said Athanasius Thomas,” the slave in controversy being then in his possession,—was competent as explanatory of his possession, and properly admitted by the court as part of the *res gesta*.

6. Neither was there any error in permitting the plaintiff to read the answer of Allen to the cross-interrogatory of the claimant, respecting the arrest of Athanasius Thomas under a *capias ad satisfaciendum*. The answer is responsive to the interrogatory, which elicits this new matter, and which, as it was connected with the consideration of the demand for the satisfaction of which this slave was sought to be condemned, was not irrelevant. The claimant, having examined the witness as to the arrest upon the *ca. sa.*, without requiring the production of the writ, cannot object, when the other side elects to read the proof so brought out upon his cross-examination, that the writ was not produced. The law does not allow a party thus to experiment,—to ascertain by actual examination what a witness will swear, and then admit or exclude the answers at his election.—Stewart v. Hood, 10 Ala. R. 607.

7. The 8th interrogatory requires the witness Crosby to state the extent of Athanasius Thomas’ indebtedness before he left South Carolina, and how long it had continued; and to state any facts the witness might know going to show his solvency or insolvency, and what general rumor in the neighborhood in which said Thomas then resided, said respecting his solvency, &c. The cross-interrogatory of claimant asks the said witness to state “If, at any time, Athanasius Thomas was under arrest for debt. If so, and if more than once, that he state the first date at which he was so under arrest, and the manner of his discharge from arrest; and if, at the time



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he was under arrest in 1835 or 1836, the boy Jim was not in the possession of William and Mary Thomas," &c. The witness speaks of the arrest of A. Thomas under a *ca. sa.* in his answer to the 8th interrogatory, and when he comes to answer the cross-interrogatory, he says, "A. Thomas was notoriously insolvent. He was under arrest on the *ca. sa.* before alluded to. This was five or six months before they went away. Can't say whether he was ever arrested in 1835 or 1836."

The bill of exceptions presents the objection arising upon this examination as follows: "Claimant objected to so much of the 8th interrogatory as is as follows—'after judgment he was *ca-saed*, and took the prison bounds, giving Thomas Henderson as his security. Henderson afterwards had the debt to pay, in consequence of Thomas going away'; the ground of the objection being that said proof was incompetent and illegal. No record evidence of a judgment, *ca. sa.*, or of said Thomas' having been placed in the prison bounds, was produced." The court admitted the proof as evidence of the consideration of the demand of the plaintiff in the execution; the evidence showing that the present execution was for a debt which Henderson had paid for said Thomas, under the above circumstances.

It is not necessary for us to decide whether the proof would have been illegal, as secondary evidence, had the interrogatory in chief called for it directly. Even conceding that it is secondary evidence, and falls under the rule that the better primary evidence must be adduced, or its absence accounted for, before it could be received, if no objection for this cause had been taken to the interrogatory, it would, perhaps, have been considered as waived. The point of waiver is presented in a much stronger aspect against the claimant by the facts before us. Here the leading examination makes no inquiry for the *ca. sa.* or arrest under it. The claimant examines as to this, which is original matter, by cross-interrogatories; and the answer objected to is directly responsive to such cross-examination, while it is incidentally stated as a response to the 8th interrogatory in chief. Under these circumstances, we think the claimant cannot raise the objection at the trial, that the judgment and *ca. sa.* with the proceedings thereon of record, were not produced.

Had the direct examination called for this proof, and the cross-examination been limited to it, its exclusion upon the direct examination would have entitled the claimant to have it also excluded upon the cross-examination.—*Olds v. Powell*, 7 Ala. R. 652. But in this case the claimant's inquiry calls for it as original matter; and it is proper to refer the testimony to his specific interrogatory, rather than as elicited by the direct examination, which does not call for it, and in response to which it was, as we have said, incidentally detailed by the witness.

We are unable to perceive any error in the record, and the judgment must be affirmed.

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### FRIEND vs. OLIVER.

[ACTION UNDER CODE FOR SPECIFIC RECOVERY OF BALES OF COTTON.]

1. *Execution of power of appointment.*—A bequest by will to the separate use of a married daughter, by a widow having a life estate with a power of appointment in favor of her children, is a good execution of the power.
2. *Code (§ 2131) inapplicable to separate estates created by will.*—Section 2131 of the Code, which requires the wife to sue alone when the suit relates to her separate estate, does not apply to separate estates created by will before the adoption of the Code.
3. *When husband must sue alone for wife's separate estate.*—Where a separate estate in a married woman was created by will before the adoption of the Code, and no trustee was appointed, the legal title passed to the husband, and he alone had the right to sue for the recovery of the property.
4. *Amendment of complaint.*—When the wife improperly sues in her own name for the recovery of her separate property, the complaint cannot be amended by striking out her name and inserting that of her husband.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. EDMUND W. PETTUS.

THIS action was brought by the appellant, Mrs. Anne V. Friend, the wife of John G. Friend, against William C. Oliver, for the recovery of fifty-eight bales of cotton and three thousand pounds of seed cotton, which the defendant, as sher-

iff of said county, had taken under sundry executions against said John G. Friend. The trial was had on issues joined on the pleas of the general issue and justification under legal process.

The evidence set out in the bill of exceptions shows that the plaintiff is the daughter of Judge Henry Minor, who died in 1838, after having made and published his last will and testament in writing, which was duly admitted to probate after his death, and which contained these provisions:—

“I give all my property, real and personal, to my beloved wife, Frances T. Minor, during her life or widowhood, in order to provide as she may think best for the support of herself and our children. I give her full power to sell and convey all or any part of the property, real and personal, in order to pay my debts, support and educate our children, or provide a residence for herself at any place she may prefer to this. I authorize my wife to give and to divide among our children the property I may leave, or the proceeds thereof, in such portions as she shall think just and expedient. She will hardly marry again; if she should, it is my will, that she have a child's part of my estate, estimating the whole value of all that there may be; and I request that, before such second marriage, she will divide the remainder of the property among our children, in such way as she may think equitable, or convey the children's share to some friend, on whom she can rely, in trust for their benefit according to the provisions of this my will.”

Mrs. Minor qualified as executrix of her husband, and acted as such until her death, which occurred in 1846; having never married a second time. By her last will and testament, which was duly admitted to probate after her death, she directed an equal division of her property among her children living at her death, and gave the shares to be allotted to her daughters “to their sole and separate use, free from the control of their husbands.” A distribution of her estate was made in 1849, by order of the Orphans' Court, under which certain slaves, who had passed to her under her husband's will, were allotted to the plaintiff, who had intermarried with said John G. Friend during the lifetime of her father. These slaves went into the possession of the plaintiff and her husband in De-

ember, 1849, and were worked separately from her husband's slaves during the years 1850, 1851, and 1852. The cotton sued for in this action was raised, in 1853, by the joint labor of these slaves and others belonging to John G. Friend, who was shown to have been insolvent at the time.

The court charged the jury, in substance, that the plaintiff was not entitled to recover in this action, if the cotton sued for was raised by the joint labor of slaves belonging to John G. Friend and those belonging to his wife, and Friend was insolvent at the time; and to this charge the plaintiff excepted. In consequence of this charge, with other rulings of the court, the plaintiff was compelled to take a nonsuit, which she now moves to set aside.

WM. M. BROOKS, for the appellant.

WM. P. WEBB and P. HAMILTON, *contra*.

GOLDTHWAITE, J.—The plaintiff below bases her right to recover the cotton sued for, as being the product of slaves in which she had a separate estate; and this estate was created, either by the will of Henry Minor, or by the will of Mrs. Minor. In this aspect, it is entirely immaterial whether Mrs. Minor took an absolute interest under the will of her husband, or whether she took a life estate with a power of appointment in favor of the children. If she took the first, she had the right to bequeath the slaves to the separate use of the legatee; and if the last, the power was properly executed by will (Sugden on Powers, 217), and the giving to the separate use of the married daughters, was a more strict execution of the will of the donor.—Sugden on Powers, 514, 515.

The difficulty, however, in the present case, is, that the wife cannot, at the common law, sue alone, and the section of the Code (§ 2131) which authorizes her to bring the action in her own name, does not apply to a case of this character.—Gerald v. McKenzie, at the present term.

There being no trustee, the legal title passed to the husband (Gerald v. McKenzie, *supra*), and he alone would have the right to sue (Land v. Gibson, at the present term); and this being the case, the complaint could not be amended, by striking out the name of the wife, and inserting that of the husband.—Leaird v. Moore, at the present term.



As, therefore, the action was improperly brought by the wife, who had no legal right of action whatever, and could not recover under any circumstances in the present action, the errors of the court, if there was error, cannot be regarded as prejudicial to the plaintiff.

Judgment affirmed.

## ALABAMA & TENNESSEE RIVERS RAILROAD CO. vs. BURKE.

[ACTION UNDER CODE TO RECOVER DAMAGES FOR LOSS OF SLAVE.]

1. *Liability of hirer of slave for negligence.*—The hirer of a slave is responsible only for the omission of that care and diligence which the generality of mankind use and exercise in relation to their own slaves under similar circumstances; and if he re-hires the slave to another, his own contract of hiring being general in its terms, he is equally responsible for the same degree of negligence on the part of his bailee.
2. *Failure to call in physician not necessarily negligence.*—The law does not make it the duty of the hirer, under a contract general in its terms, to call in a physician on every occasion when the slave is sick and he does not know what is the matter with him; nor does it pronounce him guilty of neglect, merely because he does not, under such circumstances, call in a physician.
3. *Act tending to show negligence may be proved to have been done under advice of physician.*—Where the plaintiff introduces evidence of an act tending to show negligence in the treatment of the slave—*e. g.*, his removal by railroad, while sick—the defendant has the right to prove that he acted under the advice of a physician.
4. *When sub-hirer is competent witness for his bailor.*—If the complaint is so framed as to authorize a recovery only for the negligence of the defendant himself, a person to whom he re-hired the slave during the term, and in whose possession the slave died, is a competent witness for him; *aliter*, if the complaint would also authorize a recovery for the negligence of the witness.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

This action was brought by John M. Burke against the appellant, and the complaint was in these words :—

“ The plaintiff claims of the defendant \$1,500, damages for

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the price or value of a negro man slave, named Allen, which said slave was hired by the plaintiff to the defendant, on the first day of January, 1852, at the special instance and request of the defendant, to work on said railroad as a laborer ; but the said defendant removed said slave from work on said road, and hired him to work with a mill company, *being other and different employment from that for which he was hired by the plaintiff to the defendant* ; and thereby, then and there, the said slave became and was sick, sore, and maimed, and was then and there neglected, and not attended to by the said defendant, having him in charge ; and in consequence of such sickness and neglect, he, the said slave Allen, afterwards, to-wit, on the 25th day of December, 1852, then and there died ; to the plaintiff's damage \$1,500," &c.

After the argument of the cause had been commenced, the court allowed the plaintiff, on motion, to amend his complaint by striking out the words above italicized ; and to this the defendant excepted.

On the trial, the plaintiff offered in evidence the written contract between himself and the defendant, for the hire of the slave Allen, during the year 1852, at the price of \$200. By the terms of this contract, the railroad company promised to clothe the slave, and it was agreed that a deduction should be made for any loss of time caused by his running away ; but no stipulation was made concerning the business in which he was to be employed. It appeared in evidence, from testimony adduced by the plaintiff, that the slave was employed as an ox-driver during the first part of the year, in hauling saw-logs to the defendant's steam-mill near Selma ; that in June the mill was moved higher up on the railroad, into the county of Perry, and there put under the control of the "Bibb County Steam-mill Company", an incorporated company, to whom the slave was re-hired for the remainder of the year ; that the slave Allen was still employed as an ox-driver, so long as he was able to work ; that in the latter part of November he became sick, and was sent down on the railroad to Selma ; that the night on which he was sent down was cold, damp, and inclement ; that one Marlow, in Selma, who had been requested by the plaintiff to pay attention to his negroes hired on the railroad, removed him that night to his own

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house, and called in a physician on the next morning, who pronounced his disease dropsy of the chest; and that the slave died within forty hours afterwards.

Evidence was offered by both parties, showing the condition of the shanties in which the railroad hands were lodged, the manner in which they were fed and clothed, and the opinions of different physicians as to the symptoms, treatment, &c., of the slave Allen; but as none of these matters enter into the opinion of the court, it is unnecessary to take further notice of them. The defendant offered Dr. Fair as a witness, and proposed to prove by him "that the manager of said steam-mill company, and the person who had control of Allen, (who was ruled by the court to be incompetent to testify in this case.) consulted with witness, as a physician, to procure his advice as to the propriety of sending Allen to Selma for medical treatment; and that, on this consultation, witness advised that Allen should be sent to Selma, as he was. It appeared that the physician did not see Allen, but that his condition, as understood by said manager, was described to the witness. The plaintiff objected to this testimony, and the court sustained his objection; to which the defendant excepted."

The defendant offered one Houston as a witness, who was proved to be a member of said steam-mill company; but the court sustained an objection to his competency on that ground, and the defendant excepted.

The defendant asked the following charges to the jury:—

"1. If the jury believe from the evidence, that those who had the charge and control of the slave Allen, used and exercised that degree of care and attention, which the generality of men use in relation to their own slaves, under similar circumstances, the defendant is not chargeable with neglect of said slave. This charge the court refused, and the defendant excepted.

"2. If the jury believe from the evidence that the slave Allen had a latent chronic disease, which was on him at the time of the hiring, and continued down to his death, the defendant was not bound to use more than ordinary diligence in the discovery and treatment of the disease; and if it required skill to ascertain and detect the disease, beyond that

which is common to men of ordinary knowledge,—then, not employing a physician is not evidence of negligence. The court refused this charge alone, but gave it with this qualification: ‘That if the slave was manifestly sick, and the defendant did not know what was the matter with him, it was the duty of the defendant to call a physician, and not to do so was neglect.’ To the refusal to give this charge as asked, and to the qualification given, the defendant excepted.

“3. The jury must be satisfied from the evidence, not only that there was negligence on the part of the defendant, or of those having charge of the slave, but that the death of the slave was the result of that negligence, before the defendant could be made liable for his death. This charge the court refused to give alone, but gave it with this qualification: ‘That if the negligence related to the disease of which the slave died, then it would be culpable, and the defendant would be chargeable with it.’ To the refusal to give this charge as asked, and to the qualification given, the defendant excepted.”

All these rulings of the court are now assigned for error.

LAPSLEY & BYRD, and JOHN T. MORGAN, for appellant:

1. The evidence of Dr. Fair ought not to have been excluded. As the act of sending the slave by railroad to Selma was relied on by the plaintiff below to show neglect, it was certainly competent for the defendant to show that he acted on the advice of a physician, in order to rebut the idea that it was carelessly and unadvisedly done.

2. The court erred in sustaining the objection to the competency of the witness Houston. The rule which excludes a servant from testifying to discharge his master from liability for his negligence, does not apply to this case, for, if the action is founded on the idea that the steam-mill company was the servant of the railroad company, the facts would not authorize a recovery.—Cook & Scott v. Parham, 24 Ala. 21; Walker v. Bolling, 22 *ib.* 294. The steam-mill company was the agent of the railroad company to control the slave; and this being the case, the members of the former company were competent witnesses for the latter, for the reason which makes all agents competent witnesses—to-wit. from the necessity of the case.—Bean v. Pearsall, 12 Ala. 592. But if



the steam-mill company was neither the servant nor the agent of the railroad company, still the members of the former company would be competent witnesses for the latter, in such a case as this, because there is no such privity between them, either in law or by contract, as would make the judgment, whether in favor of or against one of them, evidence for or against the other.—Crutchfield's Heirs v. Hudson, 23 Ala. 393; Jones v. Park, 1 Stew. 419; Poe v. Dorrah, 20 Ala. 288. In any point of view, the witness is competent; his liability to the railroad company being counterbalanced by his liability to the plaintiff for the same act of negligence.

3. The court erred in refusing the first charge asked by the defendant below, which asserts the clear and just principle, that if those "who had charge and control of the slave, used and exercised that degree of care and attention which the generality of men use in relation to their own slaves under similar circumstances", the defendant would not be chargeable with neglect.—Story on Bailments, § 399; Jones on Bailments, 88; Batson v. Donovan, 4 Barn. & Ald. 21; Reeves v. Constitution, Gilpin's R. 579-85; Salter v. Hurst, 5 Miller's (La.) R. 79; 2 Brod. & Bing. 359; 2 Kent's Com. 586.

4. The court erred, also, in refusing the second charge asked, and in the qualification given. A slave might be manifestly sick, and yet the hirer (or owner) act perfectly right in not sending for a physician, although he might not know the nature of the disease.

5. The court erred, also, in refusing to give the third charge asked, and in the qualification given. To render the defendant liable for the death of the slave, the death must have been caused by his neglect.—2 Kent, 587; Runyan v. Caldwell, 7 Humph. 135; Mims v. Mitchell, 1 Texas R. 443.

WM. M. MURPHY and J. H. CAMPBELL, *contra*:

1. The testimony of Dr. Fair was properly excluded; 1st, because it would be enabling the defendant to make testimony for itself, through its agents or servants: and, 2dly, because it would be but the adoption by the witness of the opinion of an unprofessional man, as to the condition of the slave and what he required.—1 Greenl. Ev. § 110; Mobley v. Barnes, 26 Ala. 718.

2. The testimony of Houston was properly rejected, as he was a party in interest.—Code, § 2403; Walker v. McCraw, 26 Ala. 189.

3. The rule as to negligence, in such a case as this, is, that the hirer is bound to use such diligence and attention as men of ordinary care and prudence take of their own property, and is equally responsible for the acts of his servants.—Cook & Scott v. Parham, 24 Ala. 21; Story on Bailments, §§ 398, 399, 400; Scudder v. Wallbridge, 1 Kelly's (Geo.) R. 199. Tested by this rule, there was no error in the charges given, nor in the refusals to charge as requested.

RICE, J.—Where the contract of hiring is general in its terms, and does not restrict the employment of the slave to any particular business, the hirer has the right to re-hire him to another, “being responsible to the owner for his proper treatment, and for his not being employed otherwise than is authorized by the scope of his agreement with the owner.” Seay v. Marks, 23 Ala. R. 532.

The hirer is not only liable for his own personal negligence, but for the negligence of the person to whom he re-hires the slave.—Story on Bailments, § 400. But in either case, he is responsible only for the omission of that diligence and care which the generality of mankind use and exercise in relation to their own slaves under similar circumstances.—Story on Bailments, §§ 398, 399.

This is the only just rule to apply to a contract of hiring which is general in its terms. It rests upon the ground, that each party to such a contract knows the degree of care used by the generality of mankind in relation to their own slaves, and that each is satisfied silently to take that degree of care as part of their contract. If the owner desires a higher degree of care, he should inform the hirer of it, and bind him to its exercise by a contract special in its terms.

The law does not make it the duty of the hirer, under a contract general in its terms, to call a physician on every occasion when the slave is manifestly sick and the hirer does not know what is the matter with him. Nor does the law, under such a contract, pronounce the hirer guilty of neglect, merely because the slave was manifestly sick and he did not know what was the matter with him, and did not call a phy-

sician. Under such a contract, the law will not do or say anything inconsistent with the rule above stated—to-wit, that the hirer is responsible only for the omission of that diligence and care which the generality of mankind use and exercise in relation to their own slaves under similar circumstances. Whether there may not be cases, under such a contract, where, under all the circumstances, the failure to call in medical assistance, would, in law, amount to a want of ordinary diligence,—we do not decide.

To sustain the allegation of neglect, the plaintiff, among other things, gave in evidence the fact that the slave, whilst sick, was removed from the steam-mill in Perry county to Selma, by railroad. After this evidence was given by the plaintiff, the defendant had the right to explain (if he could), by evidence, why the slave was so removed whilst he was sick. For this purpose, the testimony of Dr. Fair, as offered by defendant and excluded by the court, was clearly admissible.—*Goodgame v. Cole*, 12 Ala. R. 77; *Yarbrough v. Moss*, 9 *ib.* 387; *Leaird v. Davis*, 17 *ib.* 28; *Pitts v. Burroughs*, 6 *ib.* 733; *Dearing v. Moore*, 26 *ib.* 586.

In determining the competency of a witness, regard must be had to the issue joined between the parties. The competency of Houston as a witness for defendant in this case, without a release, depends on the question, whether the plaintiff's complaint, in its present shape, does not exclude him from recovering under it for the negligence of the steam-mill company. We shall decline now to decide this question, because it is evident to us that the plaintiff can, and ought, so to amend his complaint as to avoid it altogether. If the complaint is so framed as to authorize the plaintiff to recover of the defendant damages for the negligence of the steam-mill company about the slave, then, under such a complaint, Houston is not a competent witness for the defendant, without a release; he being a member of that company, and liable over to defendant if plaintiff recovers of the defendant.—1 Greenl. Ev. §§ 393 to 397; *Otis v. Thom*, 23 Ala. R. 472. If, however, the plaintiff's complaint is so framed as to exclude him from recovering for anything but the *personal negligence* of the defendant, then, under such complaint, Houston is a competent witness for defendant.

We deem it unnecessary to decide any other questions presented by the record, except those hereinabove considered and decided. From what we have above decided, it is clear the court below erred in several particulars. Its judgment is reversed, and the cause remanded.

### BRANTLEY vs. WEST.

[BILL IN EQUITY TO HAVE ABSOLUTE SALE HELD A TRUST OR MORTGAGE.]

1. *Variance between allegations and proof.*—Where the bill alleged a single contract, by which complainant transferred six slaves to defendant, in consideration that he should pay all the just debts of complainant; while the proof showed that there were two contracts, made on different days, and that defendant promised to pay only those debts which were then in execution,—held, that the bill was properly dismissed on account of the variance.
2. *Fraudulent contract cannot be established in equity.*—Equity will not interfere to declare a contract, which is on its face an absolute sale, to be a trust or mortgage, when the evidence shows that the transaction was intended to defraud the vendor's creditors. *In pari delicto, potior est conditio possidentis.*
3. *Sufficiency of parol evidence to convert written contract of sale into trust or mortgage.* Where a party seeks relief in equity in the face of a written instrument, asking that an absolute sale may be held a trust or mortgage, he must establish his case by clear and convincing proof. It is not sufficient to raise a doubt, or suspicion, whether the writing expresses the true contract of the parties: nor is proof by several witnesses of defendant's subsequent declarations, which are not charged in the bill, sufficient to outweigh the positive denial of his answer under oath, the writing itself, and the testimony of the subscribing witness.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Jonathan S. Brantley against James West, and alleged these facts: That in April, 1846, complainant, being possessed of six slaves, an undivided interest in certain real estate lying in Wilcox county, and some other personal property, and having fallen into intemperate habits, by which his physical and mental powers were greatly enfeebled and impaired, and his pecuniary circumstances greatly



embarrassed, was induced by the earnest solicitations of the defendant, who was his brother-in-law, to enter into a verbal agreement with him, by which complainant hoped to relieve himself of his embarrassments, pay his just debts, and preserve his negroes. This agreement is thus stated in the bill : " That he, the said James West, might take into his possession all the property of your orator, and should pay all the just debts of your orator ; and when this was accomplished, and the labor of the said negroes should, at a fair and reasonable rate, amount to a sum sufficient to remunerate said West for the sums applied to the payment of your orator's debts, and a just and fair compensation to the said West for his trouble and expenses in the adjustment of the affairs and business of your orator, he, the said James West, would restore to your orator the said negro slaves." The bill alleges, that on the 11th April, 1846, by virtue of said verbal agreement, said West went into the possession of the six slaves, one horse, one mule, about three hundred bushels of corn, and three thousand pounds of fodder, for all of which articles he was to account to complainant at a fair and reasonable price ; that complainant, at the earnest solicitations of said West, also suffered his undivided interest in said lands to be sold, and the proceeds (the exact amount of which he cannot state) went into the hands of said West, to be applied to the payment of complainant's debts.

The bill further alleges, that some time after West thus obtained the possession of said slaves and other property, and while complainant was still laboring under the same physical and mental imbecility, and had the utmost confidence in the honesty and friendship of said West, complainant was induced to make to said West an absolute bill of sale of the said slaves, upon the positive declarations and assurances of said West that he would honestly and faithfully carry out and perform his original undertaking and agreement with complainant, to restore him the said slaves when he had retained them for a time sufficiently long to make their labor, at a fair valuation, amount to a sum sufficient to remunerate said West for all sums which he might pay for complainant, and the necessary trouble and expense he might incur ; that at the time this bill of sale was executed, said West paid to complainant

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the sum of \$900, which complainant paid back to him on the same day, and said West has never repaid it, nor any part of it; that in the month of September in the same year, and while complainant was still in the same state of mental and physical imbecility, said West obtained from him, without any other consideration, another written instrument in reference to said slaves, the exact nature of which complainant does not recollect, but believes it was some receipt for the price, or a bill of sale for the said slaves. The bill then alleges, that the slaves, with the other property conveyed to said West, were at that time worth much more than the amount of all complainant's debts; that West has not complied with his agreement, and has not paid more than from \$1,200 to \$1,400 for complainant, leaving a large number of his debts unpaid; that the hire of the slaves since they went into West's possession, and the proceeds of the sale of the other property received by him, are more than sufficient to remunerate him for all the money that he has expended for complainant, as well as reasonable compensation for his trouble and services; and that he now refuses to restore the slaves. The prayer of the bill is for an injunction to prevent the removal of the slaves, and a discovery and account; that West be decreed to pay over to complainant whatever balance may be found due him on the stating of the account; that he be held to restore said slaves to complainant; and for general relief.

The defendant answered the bill, and denied all its material averments, except the fact that complainant, in April, 1846, was greatly embarrassed in his pecuniary circumstances, and was addicted to intemperate habits, though his mental capacity was not then at all impaired. He states that, previously to April, 1846, as administrator of J. A. Brantley, deceased, he had obtained a judgment against complainant, on which execution was issued, and levied on complainant's lands in Wilcox county; that he became the purchaser at the sheriff's sale, at the price of \$400, which was not enough to satisfy the execution; that other judgments were obtained against complainant about the same time, on some of which executions were issued, which equaled (if they did not exceed) the entire value of his property; that under these circumstances, respondent, being willing to assist complainant, and to prevent

his negroes from being sacrificed at sheriff's sale, purchased from complainant, on the 8th April, 1846, one of the negroes mentioned in the bill, at the price of \$500, and took from him a bill of sale; that on the next day he also purchased from complainant the other five negroes mentioned in the bill, with two horses and one mule; that the contract between himself and complainant was, that respondent should purchase the slaves and other property absolutely, at a specified price for each, amounting in the aggregate to \$2,690; that respondent, on his part, stipulated and agreed to pay off all the judgments against complainant which had acquired a lien on the property, the exact amount of which was not then known to them, and to pay the balance of said \$2,690 in cash; that respondent then paid to complainant \$800, the estimated difference between the amount of said judgments and the price of said property, and it was agreed that the exact balance should be adjusted so soon as the amount of the judgments was definitely ascertained, by either party paying the balance against him.

Respondent annexes, as exhibits to his answer, the bills of sale above described, which exactly correspond with his description of them; and at the foot of the second is this agreement: "It is agreed between the parties, that James West is to pay and satisfy sundry writs of execution, now in the hands of, and levied by, the proper officer, against the said J. S. Brantley, and no others." Respondent further denies that any portion of said \$800 was repaid to him by complainant; alleges that said contract was, and was intended to be, an absolute sale; admits that he afterwards volunteered to let complainant have his slaves back again at the same price, upon his repayment of the moneys expended for him by respondent, which complainant failed to comply with; alleges that he "has paid and satisfied judgments and executions against complainant, besides other debts, to an amount exceeding the said estimated value of said property; and appends to his answer, as an exhibit, a statement of the debts which he has thus paid, amounting to about \$1,320, but marked "incomplete."

On the part of the complainant, John E. Brantley, E. H. Cook, J. W. Hudson, and L. W. McMillan, were examined as witnesses; and on the part of the defendant, beside said

Cook and McMillan, H. P. Heath, Robert Heath, T. M. Jackson, Nelson Taylor, and Samuel West. The testimony of these witnesses, in brief, may be thus stated :

*John E. Brantley* states, that complainant's mind was impaired by his intemperate habits in 1845-6 ; and he was not competent to manage his affairs with prudence. Was present at the sale of Lucy by said Brantley to West ;—" the conduct of West manifested a desire to transact the matter privately " ;—" told both the parties I thought it was swindling. " Has heard West say, on several occasions (dates not recollected), that he had sold Brantley's land for \$1,200, and that he intended to pay it over to Brantley. Has always believed that West had Brantley's property, and had never paid him for it. Has often told West this ; who sometimes replied that he had paid for it, at other times would not say anything, and then again said ' it was none of witness' business '. West told witness, in the spring of 1848, that he owed Brantley \$1,200 for the land. At the time when the sale of Lucy took place, " both parties acted very strange, like they were disposed to do something wrong. " Witness told them it was a swindling operation ; but West afterwards explained to witness that Brantley gave the negro girl to West for the land. " Complainant went to West, and told him that he would go to his brother Jesse, in Louisiana, and get him to come and redeem his property : and West told him that he would never give them up to anybody but him. " Brantley's debts amounted to \$1,500 or \$1,600, of which from \$1,200 to \$1,400 were in judgment.

*E. H. Cook* was at the house of John E. Brantley, in April, 1846, when West requested him to walk into a back room, where he found complainant. Was requested by them to write a bill of sale for a negro, which he did ; and the first bill of sale appended to the answer is in his handwriting. Does not recollect the conversation which took place between the parties, but thought from the mystery and secrecy with which the transaction was conducted that there was something wrong. Saw no money paid, but a due bill for \$30 or \$40 passed from West to Brantley. Brantley was not under the influence of liquor at the time. On leaving the room, told John Brantley his impression that something wrong was



going on in his house: whereupon Brantley, much excited, walked into the room, swearing that he would stand no such transactions, as he was bound as surety for complainant; and West then told him he should lose nothing by complainant, and promised to secure him against all the debts. Had a conversation with West, in 1848, in which West told him that he saw Brantley was squandering his property, and that he had taken charge of it: and also consented that witness should make a settlement between him and Brantley on the following conditions: "That at the time he took the property, the understanding was, that he was to pay Brantley's debts, and furnish him with the means to support his family, and was to allow him the hire for his negroes; and whenever the hire of the negroes liquidated the debts, be the time long or short, Brantley was to have his property back."

*McMillan* proves Brantley's intemperate habits, and consequent incapacity, when drunk, to make a prudent bargain; and states that he knows, from information derived from both parties, that West bought certain negroes and other property from Brantley some time in April, 1846.

*Hulson*, in the early part of the year 1846, had an execution in his hands against Brantley, and was referred by him to West, who (B. said) would satisfy it. Called on West, who stated that he had already assumed more of Brantley's debts than he agreed to pay when he took the property; that he intended to sell all the property but the negroes, and that he wished to save them for Brantley; that it would take him two or three years to pay the debts which he had assumed, and then Brantley would get his property again. Brantley was very intemperate, and was not capable of attending to his own business when drunk; his mind was impaired.

*Adison Taylor* was the subscribing witness to the bill of sale for the five slaves, and states that the contract was as follows: "West was to pay Brantley \$800 in cash, and was to take up certain executions held against Brantley at the time"; and borrowed some \$375 from witness to pay it. Looked upon the trade as made in good faith, and for a full consideration. Brantley was sober at the time.

*Samuel West* was not present at the trade, but both the parties told him about it on the next day, and stated the con-

tract as follows: "Defendant purchased from complainant five negroes, upon consideration that defendant pay and satisfy certain executions which were then hanging over the negroes, and pay complainant in addition \$800." Complainant was much embarrassed at the time of the sale, and his negroes would soon have been sold by the sheriff, if he had not sold them as he. The price was fully as much as they would have brought at sheriff's sale. Has heard defendant frequently, since that time, offer to let complainant have his negroes again, if he would refund the amount paid out for him. States, also, that two days before said contract was made, complainant came to him, and proposed that he should run off his negroes to avoid the payment of his debts.

*T. M. Jackson* testifies to declarations made to him by both Brantley and West, in effect, "that the sale of the slaves was absolute, but Brantley had the privilege of redeeming, or taking them back, whenever he refunded the amount paid him by West"; that West agreed to pay a certain amount in money, and also to pay off all the judgments against Brantley.

The other witnesses testify to no material facts.

The chancellor dismissed the bill, because of a variance between the allegations and proof; and his decree is now assigned for error.

*J. H. CAMPBELL* and *Wm. M. BYRD*, for the appellant:

1. The testimony clearly establishes a secret trust, and thus disproves the answer; and the answer, being disproved as to this leading fact, is not to be regarded as evidence for any purpose, but is to be taken merely as a plea.—*Pharis v. Leachman*, 20 Ala. 662; *Gunn v. Brantley*, 21 *ib.* 633.

2. The case made by the bill is substantially sustained by the proof; and though the proof may go beyond the allegations of the bill, that affords no reason why relief should not be granted to the extent of the allegations. To hold a party to strict proof of a secret trust, according to his allegations of its terms, would be requiring more than is ordinarily possible; and the rule only requires that the allegations should be substantially proved.—*Story's Equity Pleadings*, § 264; *Daniel's Chancery Practice*, 997; 4 *Stew. & P.* 318. The rule as to variance only applies where the evidence discloses

a case for relief different from that set up by the pleadings. *Gilechrist v. Gilmore*, 9 Ala. 985; *English v. Lane*, 1 Port. 328; 5 Stew. & P. 67.

3. The proof establishes the fact that the bill of sale was intended as a mortgage.—1 Port. 328; 5 Stew. & P. 67.

4. The chancellor's decree cannot be sustained on the ground that the transaction was intended to defraud creditors. A mortgage by a debtor to secure one or more debts is no evidence of fraud. At the time this contract was entered into, a debtor had the right to prefer one creditor. West did not feel himself restricted to the payment of any particular class of debts: on the contrary, he alleges that he paid, "judgments, executions, and other debts"; and he declared to the witness Cook that he had assumed "to pay the debts of Brantley."

GEO. W. GAYLE, *contra*, made the following points:—

1. The contract between the parties was an absolute sale, and not a trust or mortgage. This is shown by the answer, and by the testimony of Samuel West and Nelson Taylor. The answer, being responsive, must be disproved by two witnesses, or by one witness with strong corroborating circumstances.—*Hogan v. Smith*, 16 Ala. 600. Strong proof is required to establish fraud against the positive denial of the answer;—proof of the defendant's admissions merely is not sufficient to overthrow the positive denial of his sworn answer, supported by corroborative evidence.—*Hope v. Evans*, 1 Sm. & Mar. Ch. 195; 1 U. S. Equity Digest, §§ 525, 531, p. 443. The defendant's admissions, not being put in issue by the bill, were improperly admitted in evidence.—*Brandon v. Cabiness*, 10 Ala. 156.

2. There is a fatal variance between the allegations and proof.—*Paulding v. Lee & Ivey*, 20 Ala. 754; *Adams v. Garrett*, 22 *ib.* 602; *Frecman v. Swan*, *ib.* 106.

3. The bill of sale, being perfect and complete within itself, cannot be contradicted or varied by parol proof.—*West v. Kelly's Heirs*, 19 Ala. 353; *Ware v. Cowles*, 24 *ib.* 446.

4. If the contract was not an honest and absolute sale, it was fraudulent; and equity, therefore, will not interfere. 1 Story's Equity, § 61. For proof of fraud, see the allegation

of the bill, that "West paid \$900, which was returned to him on the same day"; the evidence of Samuel West, that, "two days before the trade, complainant proposed to run his negroes, to avoid his debts"; the addendum to the bill of sale, which requires West to pay "debts in execution, and no others"; Cook's evidence, that "he thought there was something wrong"; and John E. Brantley's evidence, that "both acted very strangely, and looked like they were both doing wrong", and that he "told them it was a swindling operation."

CHILTON, C. J.—The general rule is, that no relief can be granted upon matters not charged in the bill, although the same may appear in proof, for the decree must be predicated upon the allegations and the proof. This rule is founded upon the substantial reason, that the bill, by its allegations, ought to apprise the defendant of what he is expected to meet and defend against. If a contract materially different from that set up in the bill might be proved, and a decree rendered upon such proof, the defendant would often be taken by surprise, and be denied the privilege of making his defence. Indeed, all proof outside of the allegations of the bill is irrelevant and improper.—Story's Eq. Pl. § 257; McKinley v. Irvine, 13 Ala. 693-4, and cases there cited.

In the case before us, the contract charged in the bill is as follows: "That, he, the said James West, might take into his possession all the property of the complainant, and should pay all the just debts of said complainant; and when this was accomplished, and the labor of complainant's negroes should, at a fair and reasonable rate, amount to a sum sufficient to remunerate said West for the sums applied to the payment of the said debts, and a just and fair compensation to said West for his trouble and expenses in the adjustment of the affairs and business of complainant, then the said James West would restore to the complainant the said negro slaves." After averring that West went into possession of six slaves, a horse, a mule, three hundred bushels of corn, and three thousand pounds of fodder, it is stated, that "said James West was to account for them at a fair and reasonable price."

It is then averred that, some time after West came to the



possession of the said property, he induced complainant to make to him an absolute bill of sale to said negroes, "upon the positive declarations and assurances of the said James West, that he would honestly and faithfully carry out and perform his original undertaking and agreement with complainant, to restore him the said slaves when he had retained them for a time sufficiently long for their labor, at a fair valuation, to amount to a sum sufficient to remunerate the said James West for all sums which he might pay for said complainant, and the necessary trouble and expense he might incur."

It is averred, also, that at the time of the execution of the bill of sale, complainant received of West the sum of nine hundred dollars, but paid it back to him on the same day, and it has never been refunded.

The answer positively denies that the bill of sale was designed as a mortgage, but insists that it really was, what it appears on its face to be, an unconditional transfer of the property to the defendant. And upon a close inspection of the proof, not a single witness proves the contract as charged.

Upon this ground, the chancellor dismissed the bill; and, we think, properly.

But we think he might have refused the relief prayed upon the merits. Assuming that there was a secret trust existing in favor of Brantley, we cannot resist the conclusion, that such trust was designed as a scheme to defraud his creditors. This is clearly inferable from the circumstances in proof. The complainant says in his bill, he received nine hundred dollars at the time of the execution of the bill of sale, and on the same day handed it back to the vendee. Why this was done he does not inform us. Neither is any motive shown for making the transfer absolute, when a trust or mortgage was intended, unless it be to deceive creditors who had not acquired liens upon the property. Again; why limit the payments to be made by West to debts which were in execution, excluding expressly all others, as was done by the writing appended at the bottom of the bill of sale, unless the object was to exclude all but such creditors as had a lien on the property which would override the sale, and thus save to the insolvent debtor the surplus? These circumstances, connected with the facts that, only two days before the sale, Brantley

proposed to run his negroes to avoid his debts, as proven by Samuel West, and the secret manner in which they entered into the arrangement, even deceiving the subscribing witness into the belief that the transaction was an absolute sale, and *bona fide*, very clearly show that the object was to defraud creditors. In such cases, courts both of law and equity leave parties to the consequences of their fraud. The maxim applies, "*In pari delicto, melior est conditio possidentis.*"—Addams' Equity, 175; 1 Story's Equity, § 61.

If, however, the decree of the chancellor could not be maintained upon either of the foregoing grounds, we are satisfied that, upon well-settled principles, the proof is wholly insufficient to justify the court in reforming this instrument, or decreeing it to be a trust or mortgage. When a party prays relief in the very face of a written contract, upon the ground that such writing does not truly speak the meaning and intention and true agreement designed to be entered into between them, he must clearly bring himself within the exception to the general rule which gives the preference to written over parol evidence. He must establish, by clear and convincing proof, that the instrument, although absolute upon its face, was designed as a security merely. It is not sufficient to raise a suspicion, or doubt, as to whether the instrument which the parties have adopted as the evidence of their agreement, correctly states the contract. The court must be satisfied, by at least a clear preponderance of proof, that a mortgage, and not an absolute sale, was intended.—*Vanmetre v. McFaddin*, 8 B. Mon. 438; *Jenison v. Graves*, 2 Blackf. 440; *Elliott v. Armstrong*, *ib.* 198; *Chapman & Wife v. Hughes*, 14 Ala. 218; *Bryant & McPhail v. Cowart*, 21 *ib.* 91–98.

I think it was very unfortunate that the courts of chancery ever so far relaxed the rule, as, in the absence of fraud or mistake in the execution of written instruments, to permit a complainant, in opposition to the denial of the defendant's answer, to prove by parol an absolute deed to be but a security, or an assignment in trust. It was, in my humble conception, an innovation fraught with dangerous consequences, and one which tends greatly to destroy the value of the salutary rule, which declares the writing itself to be the best evidence of what the parties intended should be the final and

binding contract between them, where nothing has been left out of the agreement by fraud or mistake, which either party supposed was inserted in it when executed. But to recede now, after so many decisions of this court, would unsettle the law, and disturb existing titles. When, however, parol proof is allowed to control written instruments, it must be clear and satisfactory.

Such is not the character of the proof in the case before us. On the one side, there is the absolute bill of sale, expressed in clear and explicit language,—the sworn denial of the defendant that it was intended to operate as a security or mortgage, and this denial substantially sustained by the subscribing witness to the instrument, Mr. Nelson Taylor, and by Samuel West; whereas the opposing proof consists of declarations of the defendant, as shown by two or three witnesses, which declarations were not charged in the bill, so as to afford the defendant the opportunity of meeting and explaining them,—are, at best, easily misunderstood, and liable to be perverted from their true meaning. It were needless to set out the proof in this place, as it will appear in the statement of the Reporter. Upon a careful examination of it, we are satisfied that it does not sustain the bill, and for this reason, if for none other, relief should have been denied.

Decree affirmed.

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### CAMP ET AL. vs. DILL.

[ASSUMPSIT ON NOTE GIVEN FOR HIRE OF SLAVES.]

1. *Admissions of one joint contractor admissible against others.*—In assumpsit against three joint makers of a promissory note, the admissions of one of the defendants are competent evidence against his co-defendants; at least, until the inference arising from the face of the note is rebutted, and it is shown that he is not jointly interested with the others.
2. *What conduct amounts to a breach of contract on part of owner or his agent.*—If a guardian hires out his ward's slaves, and afterwards deprives the hirer of their services during the term, by harboring them when run away, he is

guilty of a breach of contract; but to make him responsible for the act of his ward in harboring the slave, he must be in some way connected with it, and it must be shown to have been done by his directions, or with his assent: it is not sufficient to show that he had previously allowed his ward to make contracts in relation to his own property, and had refused to entertain a proposition to rescind the contract until he had consulted his ward.

3. *Consolidation of separate and distinct contracts.*—If two slaves are put up separately at public auction to be hired, and knocked off to the same bidder, who was induced by the representations of the owner to bid for each under the expectation that he would get both, and a single note given for the amount of their hire, the two contracts are not thereby so consolidated that a breach of one would warrant a rescission of both.
4. *Rescission of contract by hirer.*—The charges in this case, tested by the principles laid down at a former term (22 Ala. 249), held correct.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. NAT. COOK.

THIS action was brought by Anderson Dill, guardian of John Goodwin, minor heir of Thomas Goodwin, deceased, against Joseph Camp, John Bell, and Ben. F. Burns, and was founded on the defendants' note for \$125 50, for the hire of two slaves, named Carter and Alexander. The defendants pleaded separately, in short by consent, the general issue, want of consideration, and failure of consideration. For the previous report of the case, see 22 Ala. 249.

On the trial, as appears from the bill of exceptions, "the plaintiff proved that Burns, one of the defendants, a few days before the trial, admitted that he had seen the negroes mentioned in the note in the possession of said Camp, and in his service, subsequent to the date of said note, and during the year 1849; that about September of that year, he had hired the boy Carter from said Camp, for the remainder of the year; that the boy was then in the woods, but was soon afterwards recovered, and remained with witness, according to said hiring, with the knowledge and consent of said Camp, and for which said Camp received the hire of him. The defendant Camp objected separately to the introduction of these admissions as evidence against himself, on the ground that said Burns was a competent witness for the plaintiff, and had been summoned by him, and was excused from attendance by making the above admissions to plaintiff's counsel. The court overruled the objection, and defendant Camp excepted."



"The defendant then offered evidence to show that the boy Carter ran away some time in the spring of 1849, and was out of his possession until the following September; and that said slave had no provocation, except a moderate whipping inflicted by the overseer. Defendant then offered proof, tending to show that John Goodwin, plaintiff's ward, had been married about two years before 1849; that Goodwin lived upon his farm, about ten miles from his guardian, and that his slaves lived on the farm and worked with him; that said farm was about two miles from Camp's; that Goodwin married plaintiff's daughter, and had been making contracts, under the direction and supervision of plaintiff, before 1849; that this was the state of things in 1848, but this possession of the property was during the nonage of Goodwin, and was permitted by his guardian under some confidential agreement between them; that at the end of the year 1848, the estate, with all the slaves, returned into the possession of the guardian, and that Goodwin, with his family, during the year 1849, resided in St. Clair county, out of the possession of his estate. It was in proof, also, that said Camp, some time after the slaves had been in his possession under the hiring, had proposed a rescission of the contract to the plaintiff, and plaintiff said that he would see Goodwin before he acted on the subject; but nothing further was proved, in this connection, about the proposition to rescind. Upon this state of proof, the plaintiff moved to exclude from the jury the deposition of Polly Rodgers, so far as it related to Goodwin's harboring the boy Carter while in the woods in 1849, on the ground that the same was illegal. The court sustained the objection, and defendant Camp excepted." The testimony thus excluded was as follows: "She does not know the boy named Carter; but in a conversation with John Goodwin, jr., about a negro that said Goodwin called Carter, who had been hired to Joseph Camp, Goodwin said that the negro had been whipped, and that he should not go back to Camp. Witness asked him, how he would get his pay, if he did not let the negro go back; and he replied, that he would find a way to get the money."

"In order to prove the terms and conditions of the hiring at the time it was made, and the plaintiff's representations as to the character and qualities of the two boys Carter and

Aleck, the defendant introduced the depositions of John Mackey and Mrs. Eliza Goodwin." Mackey testified, that he was present at the hiring of the slaves, but arrived after it commenced; that he heard no terms mentioned, but Dill represented Aleck to be a good plowboy, and that he had been plowing three years. Mrs. Goodwin was present at the hiring, and heard all that was said; Carter and Aleck were hired separately, but both were knocked off to Camp; they were the last negroes hired, and Dill remarked, before putting them up, that he had a couple of plowboys to hire. She further testified to the capacity of the two boys.

"The evidence showed that the two boys were offered and bid off separately; that the defendant Camp bid them off, and it was afterwards agreed that one note should be taken for the aggregate amount of the hire of both, which is the note sued on. There was proof tending to show that Carter ran away from Camp, some time in the spring, and remained in the woods until some time in September; that Aleck was not a good plowboy, and that he was of a weak mind, &c., but there was a conflict in the testimony upon this point. It was proved that Dill and Camp lived about eight miles apart, in Talladega county, and that there was a good public road leading directly by their respective houses; that Camp, about four weeks after he had hired the slaves, and while he had them in his possession, went to plaintiff's house, and told him that Aleck was not a good plowboy, was wanting in mental capacity, &c., and that he desired to rescind the contract for defects in said slave; that plaintiff replied, that he knew of no such deficiencies in the slave, and that he would converse with his ward upon the subject of the defendant's proposition. The defendant gave in evidence, also, that plaintiff, in a subsequent conversation with witness, admitted that defendant had proposed a rescission of the contract for the hire of the slaves.

"Upon this evidence, the court charged the jury, that if they believed the slaves were offered and bid off separately, and for different prices, notwithstanding the defendant was the best bidder and hired them both, and afterwards, by agreement, the note was given and received for the aggregate hire of both; yet the hiring of each slave was a separate and dis-

tinct contract, and if there was a failure of consideration, or other breach of contract, as to one of the slaves only, the defendant could only claim the right of rescinding the contract as to that one. The defendant excepted to this charge, and requested the court to instruct the jury, that the contract, under the proof aforesaid, was one entire contract as to both slaves: and that defendant had a right to rescind as to both, if there was a breach of the contract as to one. The court refused to give this charge, and the defendant excepted.

"The court charged the jury, further, that in order to rescind the contract, the defendant was bound, if they believed from the proof that it could have been done conveniently, to tender back the slave or slaves, as to which he sought a rescission, to the plaintiff, and, without such offer to re-deliver the property, the offer to rescind would not be sufficient. And in this connection, the court further charged the jury, that if the plaintiff had refused, or had acted in a manner to show that he would not rescind, or receive the property, if it was offered back, then it would only be incumbent on the defendant to propose to rescind, and to return the property if plaintiff would accept it; and if the plaintiff refused to rescind, and waived the necessity of offering back the property, it would excuse the defendant from offering back the property, and would be a sufficient offer on his part to rescind. To both these charges the defendants severally excepted.

"The defendant Camp asked the court to instruct the jury, that if Dill, at the time of hiring, said that he then had two plowboys to hire, and represented to the defendant Camp that Aleck (one of the boys) was a good plowboy, and had plowed for three years; and if Camp, relying on such representations, was thereby induced to hire both of said boys, and did hire them both; and if the jury believe that Camp, at the time of the hiring, was induced by Dill to bid for both of said boys, under the belief that he would get both of them,—the contract would be entire, if he bid them both off, and executed his note for both of them. This charge the court refused to give, and the defendant excepted."

In the judgment entry the name of Joseph Camp only is stated as defendant, and the judgment is "that the plaintiff have and recover of the *defendant*" the damages assessed, &c.

From this judgment Camp sued out an appeal, and the condition of the appeal bond describes the judgment as having been rendered against Camp, Bell, and Burns. There is an agreement of record, signed by the attorney for the appellants, in these words: "It is agreed by counsel in this case, that no objection will be made to the appeal, on the ground that the bond misdescribes the judgment; and we consent, so far as we can lawfully do so as attorneys, that the judgment of the court below may be considered as amended so as to conform to the recitals of the bond, or that the bond may be considered amended so as to conform to the judgment; and in like manner that the appeal shall be considered as amended."

The errors assigned embrace all the rulings of the court shown in the bill of exceptions, which are above set out, and the rendition of the judgment against Camp alone.

MORGAN & MARTIN, for the appellant, contended,—

1. That the admissions of Burns should not have been received to destroy Camp's defence to the note. Although the defendants appeared to be joint contractors, on the face of the note, yet the other evidence in the case showed that Camp was the principal, and the others merely his sureties. Camp hired the slaves, took them into his possession, and kept them; and Burns had no connection with the transaction. Under these facts, there was no reason for allowing Burns to destroy Camp's defence to the note, by his admission of facts which militate against it; especially when, in order to be released as a witness, he made the admissions to the plaintiff's attorney. Such admissions are not against his interest, and have not that sanction for their truthfulness upon which such evidence is allowed.—*Lewis v. Woodworth*, 2 Comstock's R. 512; *McCorkle v. Doby*, 1 Strobb. 396; *Daniel v. Nelson*, 10 B. Mon. 316; *Snell v. Allen*, 1 Swan, 208; *Dillard v. Dillard*, 2 Strobb. 89; 13 N. H. 99; 7 Blackf. 170.

2. It was a good defence to the action, that Dill, or his agent, accomplice, or tool, had unjustly deprived Camp of the possession of either one of the slaves. The pleas presented this defence, and there was evidence relevant to it. Many facts are recited in the bill of exceptions, which tend, in a greater or less degree, to show Goodwin's agency for his



guardian in the care, custody, and control of the property. Dill refused to act on Camp's proposal to rescind, until he could consult with Goodwin. The deposition of Polly Rodgers, showing Goodwin's guilty participation in the fraud practiced on Camp, had been read in evidence, when the court assumed, by excluding it, to decide that it proved nothing in the case. If it was excluded, the other evidence of Goodwin's acts ought to have been excluded; and if the other evidence was relevant, so was this.—9 Ala. 313.

3. The first charge given by the court was calculated to mislead the jury. It assumes, that the defendant's only remedy, if there was a breach of contract as to one of the slaves, was to rescind the contract as to that one; whereas, if the facts stated existed, he might recoup the damages, or abate the recovery on the note to the extent of the damage he had sustained, although he did not claim a rescission.—Kenan v. Holloway, 16 Ala. 53; Camp v. Dill, 22 *ib.* 249; 9 *ib.* 10.

4. The proof shows that the two negroes, though put up separately, were hired together; that they were the last hired, and the understanding was that they should find their way into the hands of the same man. The contract was entire in its spirit, terms, and consideration.

WHITE & PARSONS, *contra*, made the following points:—

1. The admissions of Burns were certainly competent evidence against himself, and should therefore have been permitted to go to the jury. If Camp wished to avoid their effect, he should have asked a charge in regard to them.

2. At the time the deposition of Polly Rodgers was offered, nothing was shown to establish the fact that Goodwin's interference (if there was any) was with the consent or permission of Dill.—22 Ala. 261. In fact, the record shows that, at the close of 1848, Dill resumed the control and actual possession of the property; and the proof excluded relates to what Goodwin did (to be inferred from what he said) in 1849, at a time when he was not in possession of the property, and when his agency, if he ever had any, no longer existed. No citation of authority is necessary to establish the proposition that the acts or declarations of an agent, after his agency has ceased, are no longer admissible against his principal.

GOLDTHWAITE, J.—In the action of the court in receiving the admissions of Burns, there was no error. He was one of the defendants, as well as one of the makers of the note which was the foundation of the action, and which upon its face purported to be the joint contract of the parties whose names were signed to it; and being *prima facie* the joint contract of all, the admissions of either of the parties who were sued, as to facts connected with the issue, were admissible, at least until the inference arising from the form of the contract was rebutted, and it was shown that the party making the admissions was not jointly interested with the others. But as there was no evidence of this character at the time the testimony objected to was offered, the court could not properly have rejected it.

In relation to the exclusion of the deposition of the witness Rodgers: There can be no doubt, that if Dill, who hired the slaves to Camp, prevented the latter from availing himself of their labor and services during the period of the bailment, it would be a breach of the contract on his part; but if this was done by a third person, without any agency on the part of Dill, although such third person would be liable, Dill could not be held responsible. It can make no difference, in principle, that the negroes were taken by the ward (the owner of the slaves, and the beneficiary of the hire); for, in law, the contracts of the guardian are not those of the ward, and cannot be affected by his acts. In this aspect, therefore, it was not only necessary to establish that the act of Goodwin (the ward) contributed to deprive Camp of the services of the slaves, during the period for which he was entitled under his contract, but it was also necessary to connect Dill with the act. The witness, upon this point, states, that Goodwin was in the possession of the property, and had made contracts, under the direction and supervision of his guardian (Dill) before 1849; but that in the year 1848 all the slaves were in the possession of Dill, that the two boys were hired out by him on the 27th December, 1848, and that one of them ran away in the spring of 1849, and was prevented by Goodwin from returning to Camp, who hired him. Does this evidence furnish a just ground for the inference that Goodwin, in preventing the return of the slave to Camp, acted under the

direction, or with the assent of Dill? Does it tend to prove that such was the case? Conceding that he may have recognized the right of Goodwin to make contracts in relation to his property previously to 1849, this could not be regarded as an authority to break or rescind contracts made by the principal, neither would it warrant any inference of the direction or assent on the part of the principal to violate a contract made by him—an act which involves a tortious breach of duty. The evidence not tending to show any connection of Dill with the act of Goodwin, and there being no testimony previously offered tending to establish that fact, there was no error in excluding the deposition.

In relation to the first charge, it is too clear for argument, that if the contracts of hire were distinct and separate, the giving of a note for the aggregate amount agreed to be paid, would not, of itself, be a consolidation of the two contracts, so as to warrant the rescission of both, upon the breach of the one. The charge simply asserted this proposition, and was free from error.

The last charge requested was properly refused, as the evidence established that the slaves were hired separately, to the highest bidder. This being the case, if it is conceded that Camp was induced by the representations of the other party to bid for each of the slaves, under the expectation that he would obtain both, this would not convert the two contracts, which were essentially distinct and separate, into one entire contract. The belief of Camp, as to his being able to hire both slaves, had nothing to do with the transaction, and did not enter into its terms, or affect it in any way.

The second charge was also correct, according to the exposition of the law given by this court when the same case was last here.—22 Ala. 249, 258–59–60.

The question as to the rendition of the judgment against Camp alone, it is unnecessary to discuss, as the error in this respect, if any existed, is cured by the agreement of the counsel, that the record may be amended so as to include the names of the other defendants.

Judgment affirmed.

## WITTICK vs. TRAUN.

[DETINUE UNDER CODE FOR SEVERAL SLAVES.]

1. *Distinction between detinue and trespass or trover in splitting single cause of action.* Trespass, trover, or detinue, at the election of the party injured, may sometimes be maintained for the same wrongful act to several specific chattels. If he elects to proceed in trespass or trover, he is bound to regard the act as indivisible, and cannot afterwards split it up into several causes of action; but, if he elects to bring detinue, he may maintain a separate action for the detention of each chattel.
2. *Sufficiency of verdict in detinue.*—In detinue for eight slaves, a trial being had on the plea of the general issue, the jury returned a verdict that “they find for the plaintiff, and assess the value of the slaves sued for as follows.” &c., (specifying by name, and assessing the separate value of, all the slaves, except one, as to whom the verdict was entirely silent,) “and they also find the hire of said slaves to be \$200”: *Held*, that the verdict was not sufficient to authorize the rendition of judgment; while Rice, J., *dissenting*, held that it was a good finding for the plaintiff for the seven slaves named, with their hire as damages for their detention, and against the plaintiff as to the slave not named in the verdict.
3. *Plea which does not go as far as it professes bad on demurrer.*—A plea which professes to be an answer to the action as to five of the slaves sued for, while it constitutes a good defence only as to one of them, is fatally defective on demurrer.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by Mary Wittick, the appellant, against Henry Traun, to recover ten slaves—to-wit, Rose, Will, Ann, Caroline, Jim, Lucy, Sarah, John, Eliza, and Martha, together with damages for their detention. The defendant pleaded, 1st, the general issue; 2dly, the statute of limitations of six years; and his other pleas were as follows:—

“3. *Actio non*, as to five of said slaves (to-wit, Jim, Lucy, Sarah, John, and Ann), because he says that, heretofore, on the 30th day of January, 1852, the plaintiff brought her action of detinue against this defendant, in this court, by writ in the words and figures following”, &c. The plea then sets out the proceedings had in said former action, which may be thus stated: The negroes sued for were, Betsey and her seven



children—Dick, Jim, Lucy, Sarah, John, Ann, and Et, or Edward. The defendant pleaded, 1st, *non detinet*; and, 2dly, that the slaves came to his possession after the death of his intestate, as a part of his estate, and that he holds them as the property of said estate. On these pleas issues were joined, and a trial had at the Fall term, 1852, when the following judgment was rendered: "Came the parties," &c., "and thereupon came a jury", &c., "who upon their oaths do say, they find for the plaintiff, and assess the value of the slaves sued for as follows—to-wit, Betsey, at \$750; Dick, at \$600; Jim, at \$500; Lucy, at \$450; Sarah, at \$375; John, at \$250; and Et, or Edward, at \$200; and they also find the hire of said slaves to be \$200. It is therefore considered by the court, that the plaintiff recover of said defendant the said slaves, Betsey, Dick, Jim, Lucy, Sarah, John, and Et, or Edward, and the said sum of \$200 for their hire as aforesaid; and on failure of said defendant to deliver said slaves to the sheriff of Dallas county, when demanded by him, then to pay the value of said slaves as assessed", &c. The plea then avers that said judgment is still valid and subsisting, and has never been reversed, vacated, or annulled, and that the same has been fully paid and satisfied by him; that the slaves sued for in that action are the same slaves sued for in this action; that the plaintiff has not acquired any right or title to the said slaves, or any of them, since the commencement of that action, except the right acquired by the said verdict and judgment, but the title under which she now claims is the identical title which was in issue in that action; and that at the commencement of that action, and long previously, he had possession of all said slaves.

"4. For further plea, as to all the slaves sued for in this action (except those named in the last plea)—to-wit, Rose, Will, Caroline, Eliza, and Martha, defendant pleads a former adjudication and recovery, under and by virtue of the action of detinue mentioned in the last preceding plea, all the proceedings in relation to which, as set forth in the last preceding plea, are to be taken and referred to as a part of this plea, as if formally and particularly here again set forth. And defendant avers, that whatever claim or title the plaintiff had or has to the slaves named in this plea, each and all, she had

at the time of the commencement of the said action herein referred to, and that she has not acquired any right or title to the said slaves since the commencement of that action ; that the title to said last-mentioned slaves is the same identical title through which the plaintiff claimed title to the slaves sued for in that action ; that the defendant, at the commencement of that suit, and ever since, has had possession of said last-mentioned slaves, and plaintiff has acquired no right or title to them since the commencement of that suit. And defendant further avers, that the verdict and judgment rendered in that action, as set forth in the last preceding plea, except that the same has been fully satisfied by defendant, are in full force, and have never been vacated, annulled, or set aside", &c.

The plaintiff took issue on the first and second pleas, and demurred to the third and fourth ; and her demurrer having been overruled, she filed the following replications :—

"To the third plea she replies, in short by consent, that she admits the recovery of said slaves mentioned in said plea, and particularly of the said slave Ann, by the proceeding set out in said plea ; and she avers, that said court, in addition to said proceeding, at its Spring term, 1853, rendered a judgment *nunc pro tunc* in said cause, as of the term in said plea referred to, which said judgment is in the words and figures following", &c. The judgment referred to, after stating the term of the court and the names of the parties, proceeds thus : "At this term of the court, comes the plaintiff, and moves to enter judgment *nunc pro tunc* in this case, instead of a judgment recovered at the last term of this court in this case, so as to embrace in the judgment and consideration of the court the slave Ann sued for in said case ; which motion being granted by the court, the following judgment *nunc pro tunc* is entered, as of the last term of this court." The judgment entry above copied is then set out, and concludes thus : "It is therefore considered by the court, that the plaintiff recover of said defendant the said slaves, Betsey, Dick, Jim, Lucy, Sarah, John, Ann, and Et, or Edward," &c. The replication then avers, "that said judgment *nunc pro tunc* has not been reversed, annulled, or in any wise set aside ; that by the said several proceedings referred to, said plaintiff's title to said

slave Ann became a good and legal one ; that said slave Ann has been and remained in the possession of said defendant, and that he has refused to deliver her to plaintiff, or to pay plaintiff any sum of money for her, and that she was in defendant's possession at the commencement of this suit."

"To the fourth plea plaintiff replies, in short by consent, and says that she admits the recovery by plaintiff of all the slaves sued for in this action, except the slaves Rose, Will, Caroline, Eliza, and Martha ; and as to these she says, that there has been no adjudication, and that the same, at the commencement of this suit, were in the possession of said defendant, and belonged to her as her property, and that defendant unlawfully detains them from her," &c.

The court sustained a demurrer to these replications, and the plaintiff refused to plead over. The rulings of the court on the demurrers to the third and fourth pleas, and to the replications thereto, are now assigned for error.

GEO. W. GAYLE, for the appellant, cited Wittick v. Traun, 25 Ala. 317; Farrington & Smith v. Payne, 15 Johns. 432; United States Digest, vol. 3, p. 174, §§ 1022, 1023, 1040, 1041; 4 Stew. & P. 357; 7 Ala. 807; 7 Port. 441; 1 Blackf. 12.

WM. M. BYRD, *contra*, cited the following cases : Oliver v. Holt, 11 Ala. 574; O'Neal v. Brown, 21 *ib.* 484; Phillips v. Berick, 16 John. 136; Farrington & Smith v. Payne, 15 *ib.* 432; Pinney v. Barnes, 17 Conn. 420; White v. Moseley, 8 Pick. 356; 19 Wend. 207.

RICE, J.—The detention of chattels is distinguishable from a trespass upon or a conversion of them. A detention may be included in a trespass or conversion ; but there may be a detention, sufficient to support detinue, when there has been neither a trespass nor a conversion, and when, therefore, neither trover nor trespass could be maintained.—Herring v. Glisson, 2 Dev. Law R. 156; Six Carpenters' case, 8 Coke, 290; Walker v. Hampton, 8 Ala. R. 412; McCombie v. Davis, 6 East's R. 538.

When, by a single act, there has been a trespass upon or a conversion of chattels, which, at the time of such trespass or

conversion, or afterwards, are detained by the tort-feasor, the owner is not bound to treat such act as a trespass or conversion. He may do so, or he may elect not to do that, but to waive the trespass or conversion, and to treat the detention by the tort-feasor as lawful, temporarily, as to each or all of the chattels. If he elects to treat such single act as a trespass or conversion, and proceeds for it to judgment in an action of trover or trespass, then, by such election, and the very form of his proceeding, he is bound to regard such act as *indivisible*, and as giving him but one cause of action; and he cannot afterwards split it up into several.—O'Neal v. Brown, 21 Ala. R. 482; Hite v. Long, 6 Rand. R. 457. If, however, he elects not to proceed for any trespass or conversion, but for the detention only, no such consequences ensue. Detinue proceeds on a principle different from that which, in the particular now under consideration, governs trover and trespass. In them, the cause of action is the single act which constitutes the trespass or conversion, and which, when proceeded for by the plaintiff as a trespass or conversion, is *indivisible, and cannot be split up*; but in detinue, the cause of action is the detention, which, when embracing separate chattels of the plaintiff, is, *at his election, divisible, and referrible to each chattel detained*.

When one detains at the same time several slaves, which belong to another under one instrument or title, the owner may elect to treat the detention of each as a distinct cause of action, and to bring a separate action of detinue for each. Although there is a strong resemblance between these causes of action, and they belong to the same family; yet there is not an identity, but, in truth and in law, they are independent of each other. Each may be proceeded on separately, or all may be joined.—Snider v. Crog, 2 Johns. R. 229; State v. Morton, 18 Missouri R. 53.

The plain result of these views is, that the fourth plea is bad, and that the court below erred in overruling the demurrer to it.

It may be conceded, that a verdict, which finds *only part of the matter in issue*, is not good, and will not support a judgment. But it does not follow, that because a verdict *for the plaintiff* finds for him only a part of his demand, it is a find-



ing of only part of the matter in issue. Where the plaintiff's demand is divisible, there is no law which forbids the finding of a part for him, and the disallowance to him of the other part. It is believed to be the settled practice, that where a jury allow the plaintiff part of his demand only, and disallow the other part, they simply state in their verdict *the part they do find for him*, and are *silent as to the part they disallow*. If two slaves (Ben and Joe) were sued for in detinue, and on the general issue and evidence the jury should return their verdict as follows, "We, the jury, find for the plaintiff the slave Ben, and assess his value at five hundred dollars, and damages for his detention at fifty dollars", I do not suppose any one would contend, that this verdict found only part of the matter in issue. It says nothing as to Joe; yet every one would at once admit, that its *silence* as to Joe was equivalent to an express finding for the defendant as to him; and that it amounted to a finding of the whole matter in issue—finding Ben for the plaintiff in express words, and Joe for the defendant by significant silence. Whenever the words of a verdict *imply* the whole issue, it is sufficient.—Burper v. Baker, Croke's Eliz. 854.

I think the principle is incontrovertibly established, at the present day, that where a plaintiff sues for distinct causes of action, properly joined in his declaration, and the general issue is pleaded, and the jury allow him a specified number of his causes of action, and say nothing as to the others, the verdict is sufficient, and authorizes a judgment for him to the extent to which it finds for him; and that such a verdict, and judgment thereon, will bar a second action for the causes of action not mentioned in express words in the verdict.—Brockway v. Kinney, 2 Johns. R. 210; Philips v. Berick, 16 *ib.* 136; Irwin v. Knox, 10 *ib.* 366; Markham v. Middleton, 2 Strange's R. 1259; 6 Com. Dig. tit. Pl. (S. 19), (S. 26); Lewis v. Lewis, Minor's R. 99; Wittick v. Traun, 25 Ala. R. 317.

Where the plaintiff brings detinue for several slaves, and the general issue is pleaded, it not only puts in issue the title and detention as to all, but as to each. The jury may lawfully find one or all for the plaintiff. If, under such a state of pleadings, they find only one expressly for the plaintiff, and say nothing as to the others, I think the verdict, by legal im-

plication, would mean precisely that they found for the plaintiff as to the one expressly mentioned, and for the defendant as to the others.

My opinion is, that where the plaintiff brings detinue for eight slaves mentioned in his declaration, (Ann being one of the number,) and the defendant pleads the general issue, and the jury say they "find for the plaintiff, and assess the value of the slaves sued for as follows—to-wit, Betsey, at seven hundred and fifty dollars; Dick, at six hundred dollars; Jim, at five hundred dollars; Lucy, at four hundred and fifty dollars; Sarah, at three hundred and seventy-five dollars; John, at two hundred and fifty dollars; and Et, or Edward, at two hundred dollars; and they also find the hire of said slaves to be two hundred dollars"—it is a good finding for the plaintiff as to the seven slaves therein named, and their hire as damages for their detention, and a good finding against the plaintiff as to the slave (Ann) mentioned in the declaration and not mentioned in the verdict. The jury begin by saying, "they find for the plaintiff"; but they instantly proceed to show specifically what they do so find for the plaintiff,—that is, *seven* slaves separately named and valued in the verdict, and "the hire of said slaves" (to-wit, said seven slaves). The particular controls the general; the special matter limits and gives precision to the general words. *Rich v. Lord*, 18 Pick. R. 325; *Lyman v. Clark*, 9 Mass. R. 235; *Jackson v. Stackhouse*, 1 Cowen's R. 126; *Chitty on Contracts*, 85, and notes.

It was as much the duty of the jury to assess the value of each slave they found for the plaintiff, or to state expressly that the one whose value was not assessed was valueless, as to find for the plaintiff all the slaves she had proved herself entitled to recover. The finding of the jury, above set forth, carries on its face evidence that they knew such to be their duty. They doubtless valued each slave they found for the plaintiff. When they name only *seven*, and value only *seven*, and give hire for only *seven*, I cannot, either as a man or as a judge, say that, by the general words at the beginning of their verdict ("they find for the plaintiff"), they intended to find, or did find, *eight* slaves for the plaintiff. If they intended to find, or did find, Ann for the plaintiff, why did they not value

her, or give hire for her, or state that she was worthless? If they did not find, or intend to find, for the plaintiff, as to Ann, the verdict is unobjectionable; it follows the settled practice in this State in such cases, *in not mentioning her at all*, and in stating the names of those only as to whom they did find for the plaintiff. There is nothing decisive *as to the number* they found for the plaintiff, in the general words used in the commencement of the verdict; for, if they had found only one slave for the plaintiff, the verdict might well have *begun* with the same general words—to-wit, “they find for the plaintiff”. It is entirely clear, that the finding as returned by the jury may be true, and yet the slave Ann not be found for the plaintiff. To the argument that Ann is found for the plaintiff, it may well be answered, that the other seven slaves sued for are clearly and undeniably found for the plaintiff; that if Ann is found for her, it is only by argument or inference; and that *the plaintiff* cannot take seven slaves by the express words of the verdict, and another by mere argument or inference.—*Bemus v. Beckman*, 3 Wend. R. 672; 6 Com. Dig. tit. Pl. (S.) 22; *McCravey v. Remsen*, 19 Ala. R. 435.

But, whilst I think the verdict does not find eight slaves for the plaintiff, I have no doubt but that it does find seven slaves for her—the seven named and valued in it. “The utmost favor has always been extended to verdicts, and they are *not construed strictly, as pleadings are.*” Whenever the court *can collect the clear meaning of the jury from the finding*, it is bound to work it into form and make it serve.—*Moody v. Keener*, 7 Porter’s R. 218; *Tippin v. Petty*, 7 *ib.* 441; *Hobart’s R.* 54; *Hawks v. Crofton*, 2 Burrows’ R. 698; *Miller v. Shackelford*, 4 Dana’s R. 271.

I also think, the proper judgment was rendered on the verdict, at the term at which it was rendered—a judgment, in the alternative, for the seven slaves named and valued in the verdict, and for the damages and costs. But as to the meaning of the verdict, and the correctness of the judgment rendered on it at the term when it was rendered, my brethren differ from me. Their views on these matters of difference are expressed in an opinion delivered by the Chief Justice at the present term, in another case between these same parties.

If the third plea had professed to answer the complaint,

*as to Ann only*, my opinion is, it would have been good; for its allegations are sufficient, if true, to constitute a defence as to Ann. But this plea professes to answer as to Ann and four other slaves. As to these four others, we all agree, it is defective, because it does not show, with reasonable certainty, that the former judgment was satisfied *by paying their assessed values*, nor negative the idea that there was an unlawful detention of them after the former judgment was rendered. The former judgment was in the alternative, and might have been satisfied either *by paying their assessed value*, or by *merely delivering them up*, and paying the damages and costs. If it was satisfied in the former mode, such satisfaction vested in the defendant all the title to them which the plaintiff had at the commencement of the former suit. If it was satisfied in the latter mode, such satisfaction would not vest any title in the defendant. As such different consequences result from *the mode* in which the satisfaction was made, the plea *as to the four* cannot be good without showing that the satisfaction was made in money or its equivalent. The third plea is bad, on the principle, that a plea which does not constitute a defence *to the extent to which it professes to go*, is defective in substance. Where it undertakes to answer as to five slaves, but is in truth an answer as to one only, it is bad *in toto*, on demurrer.—Deshler v. Hodges, 3 Ala. R. 509.

For the errors of the court below in overruling the demurrers to the third and fourth pleas, its judgment is reversed, and the cause remanded.

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### TRAUN vs. WITTICK.

[AMENDMENT OF JUDGMENT ON VERDICT NUNC PRO TUNC.]

*For hear'notes see the last preceding case.*

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

THIS is the action of detinue referred to in the pleadings of the last case. It was brought by Mary Wittick against Henry



Traun, to recover eight slaves. The verdict of the jury, and the judgment thereon rendered at the Fall term, 1852, are set out in the third plea to the complaint in that case, which see. At the Spring term, 1853, the judgment was amended, *nunc pro tunc*, as described in the replication to the third plea; and from the amended judgment the defendant now appeals, and assigns the same for error.

WM. M. BYRD, for the appellant.

GEO. W. GAYLE, *contra*.

CHILTON, C. J.—It is laid down as a general elementary rule, that a verdict is void if it find only a part of the issue. See 6 Comyn's Digest, tit. Pleader, (S.) 19, and cases there cited. It must also be certain—that is, must find the fact clear to a common intent.—*Ib.* § 21. Keeping in view these long-settled elementary principles, we have no difficulty in arriving at a correct conclusion upon the verdict in the case before us.

We may concede, that had the jury found that the defendant unlawfully detained seven of the eight slaves sued for, naming them, and omitting Ann, it would have been equivalent to a verdict for the defendant as to her; but they have not done this. Their language is, "We find for the plaintiff, and assess the value of the slaves sued for," &c., proceeding to name seven of the slaves, valuing each separately, but omitting the slave Ann. As Ann was one of the slaves embraced in the issue, and the jury find for the plaintiff, and say they assess the value "*of the slaves sued for*", but omit her name in the assessment of the value, they leave it in great uncertainty whether they intended to find one way or the other as to her. The most reasonable construction of the verdict is, that they intended to find her with the others, but accidentally overlooked her when they came to assess the value.

Be this as it may, it would be ruinous, in many cases, to allow the rights of parties to be concluded by such verdicts. The court must not be left to infer or guess at the meaning of the jury, and to arrive at a conclusion as to the extent of their finding by argument and doubtful inference; but the facts must be found with such reasonable certainty as will

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enable the court to pronounce a satisfactory judgment, definitively settling the rights of the parties. This cannot be done in the case before us, and we think no judgment could properly have been rendered upon the verdict; much less could it be amended, so as to render a judgment *nunc pro tunc* for Ann.

The judgment must consequently be reversed, and the cause remanded.

RICE, J., *dissenting*.

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### WILLIAMS *vs.* McCONICO, GUARDIAN, &C.

[APPLICATION BY WIDOW FOR LETTERS OF ADMINISTRATION ON ESTATE OF HER DECEASED HUSBAND.]

1. *Sufficiency and approval of appeal bond.*—When an appeal is taken from a decree of the probate court, under section 1888 of the Code, a simple acknowledgment in writing is sufficient security for the costs; and if an appeal bond is taken, which describes the decree with sufficient certainty, and which is shown by the judge's certificate to have been approved by him at the time the appeal was taken, this is a substantial compliance with the law.
2. *What disqualifies widow from administering on her husband's estate.*—A widow is entitled to administer on her husband's estate, unless disqualified by some one of the causes specified in section 1658 of the Code; but the fact that she had separated and was living apart from him at the time of his death, and entertained feelings of hostility towards him, does not disqualify her.
3. *Demurrer to evidence.*—When a demurrer is interposed to evidence adduced in support of a plea, the defendant may be compelled to join in it; and if the evidence is insufficient to support the plea, judgment should be rendered for the plaintiff.

APPEAL from the Court of Probate of Sumter.

MRS. ELIZA A. WILLIAMS, the appellant, having made application for letters of administration on the estate of her deceased husband, James O. Williams, the guardian *ad litem* of the decedent's minor heirs appeared, and contested her right to administer on the ground of her unfitness. On the trial of this issue, the applicant proved the death of said James O. Williams, that she was his widow, and that she was

over twenty-one years of age, and a resident of this State. The contestant then introduced evidence, showing that the applicant had separated from her said husband some time in the spring previous to his death, and went to reside in Choctaw county; that she accused him of inconstancy, and said that she would never live with him again; that she manifested great animosity towards him, and continued to live separate and apart from him up to the time of his death; that her said husband left his business in a very confused condition, and was involved in many lawsuits; that the applicant had funds in her hands, belonging to her minor children by a former husband, of whom she was sole guardian when she married Williams, which she would not deliver up on settlement, and which (as the witness thought) she would hold against any other person offering to administer. The applicant also introduced evidence, tending to show that she was of good business capacity and good moral character, and that any one who administered on her husband's estate would be compelled to obtain her assistance.

The applicant demurred to the testimony introduced by the contestant, of which the substance only is stated above, but the court overruled the demurrer. She also offered to the court a good and sufficient bond for the faithful performance of the duties of the administration, but the court refused to receive it, and refused also to grant to her letters of administration on said estate; and to these rulings of the court she excepted, and now assigns them for error.

The appeal bond in the record is dated September 28th, 1853, and is made payable to Christopher S. McConico, the guardian *ad litem* of the minor heirs. The appeal was taken to the January term, 1854, of this court, and the bond is endorsed by the probate judge, "Approved February 18, 1854, as of the date of the execution of the bond"; but he certifies, in answer to a special *certiorari*, that the bond was in fact approved by him at the time of its execution, though he did not make the endorsement of its approval until Feb. 18, 1854.

R. H. SMITH, for the appellant.

A. A. COLEMAN and JOHN F. VARY, *contra*.

GOLDTHWAITE, J.—In relation to the objections which have been urged against the appeal bond, it is only necessary to say, that under the law regulating this appeal (Code, § 1898), security for the costs only was required; and in such cases a simple acknowledgment in writing is all that is necessary, to the effect that the surety acknowledges himself security for the costs of the appeal.—*Riddle v. Hanna*, 25 Ala. 484. Here, the obligation is to pay the costs of the appeal, which is described with sufficient certainty, and it was approved by the proper officer, as his amended return shows, at the time the appeal was taken. This we regard as a substantial compliance with the law.

In relation to the case upon the merits, the record sets out the whole evidence, and shows that the application of the appellant, as the widow of the intestate, for letters of administration, was resisted, on the ground that she was an unfit person to act as administratrix. It being established that she was the widow, she was the first person entitled to administer (Code, § 1668); and under the law, every one is a fit person, unless disqualified by some one of the causes specified in section 1658. Allowing every legitimate inference in favor of the contestants upon the evidence offered by them, it is clear that it did not establish any ground of unfitness covered by the section of the Code to which we have referred; and they should have been required by the court to have joined in the demurrer (*Alexander v. Fitzpatrick*, 4 Port. 405), and judgment on it should have been rendered in favor of the applicant.

Decree reversed, and cause remanded.

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## ROBERTSON vs. DAVENPORT & PATTERSON.

[ACTION UNDER CODE ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Recoupment of damages on breach of contract.*—Plaintiffs contracted to deliver to defendant, who was a grocer, a certain quantity of Cincinnati hams, at a



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stipulated price per pound ; to be delivered during the season as defendant might want them, and to be paid for on delivery. After the delivery of a part of the specified quantity, the price of hams rose, and plaintiffs became unable to complete their contract ; and defendant having refused to pay for those already delivered, they brought suit for the price : *Held*, that defendant, if he then knew that plaintiffs were unable to complete their contract, might refuse to pay, and might recoup his damages.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Davenport & Patterson, as partners, against Thomas H. Robertson, on an open account for \$159 33. The defendant pleaded only a special plea, alleging, in substance, that in 1853 he entered into a contract with plaintiffs, by which they promised and agreed to sell and deliver to him fifty casks of Staggs & Shay's hams, at the price of 10½ cents per pound, and to furnish them to him as he might require during the then ensuing season ; that, under and pursuant to said agreement, plaintiffs did furnish him with twenty casks of said hams, which he received and paid for at the stipulated price, excepting a small balance, which is the sum sued for in this action ; that they wholly failed and refused to furnish the remainder of the casks contracted for, although he was ready and willing (and so informed them) to receive and pay for the same according to the stipulations of said contract ; that by reason of this failure on their part, the price of said hams having risen in Mobile to 16 cents per pounds, defendant (who was a grocer in Mobile) sustained damage to the amount of about \$500, which he insists he has a right to recoup in this action, and therefore claims judgment for the balance in his favor.

A demurrer was interposed to this plea, but the court overruled it ; and a trial was then had on issue joined.

On the trial, as appears from the bill of exceptions, " it was shown that the hams sold, the price of which was sued for, were part and parcel of fifty tierces of hams which the plaintiffs had agreed, in December, 1852, or January, 1853, to furnish to the defendant during the coming year (until new hams came into market), as he should want them, and as they could be obtained from Cincinnati within a reasonable time after notice ; the defendant being a grocery merchant in the

city of Mobile. They were to be Stagg & Shay's hams, and were to be furnished at the rate of 10 cents per pound, adding thereto the expenses from Cincinnati to Mobile, which would be about  $1\frac{1}{4}$  cents per pound. About eighteen tierces had been delivered from time to time, part of the money for which had been paid; and a part of the hams which were delivered on the 15th, 20th, and 24th of August, 1853, constituted those sued for in this action. The defendant refused (*to pay for them?*), because he believed, from information derived from other sources than the plaintiffs, that he could not get the balance of hams contracted for, and that the injury he would sustain by reason of plaintiffs' non-compliance with their contract would be much more than the price of the hams now sued for. By the terms of the contract, the hams were to be paid for, from time to time, as delivered; and after the hams now sued for were delivered, the money was demanded, and payment refused by the defendant; and no more hams were delivered to him after such refusal. The defendant introduced several witnesses, grocery merchants in Mobile, who testified, that they had severally made similar agreements with plaintiffs that season, to be supplied with Stagg & Shay's hams, from time to time, in large quantities, at the same price; that a portion of the hams had been delivered by plaintiffs to each of them, but after the delivery of less than half of what they were to have received, neither of them could get any more; that they could obtain none from plaintiffs after the 15th or 20th August, 1853, and that plaintiffs, after that time, had no more hams to supply to those with whom they had contracted, and did wholly fail to supply them (said witnesses), with many other grocery merchants, with hams in pursuance of their contracts after that date. Defendant proved, also, that along in the summer of 1853 hams rose in price from  $12\frac{1}{2}$  to 16 cents per pound, and that the price kept up in Mobile until new hams came in the following season; and that he had sustained damage, by reason of his not getting the hams as contracted for, to a greater amount than the sum claimed by plaintiffs.

"After the court had charged the jury generally, the defendant requested the court to instruct them, that if they believed that plaintiffs, at the time when the money for the bill

sued upon was demanded, had ceased to have ability to comply with their contract, and the defendant knew that fact, he might refuse to pay for the hams sued for, and might recoup his damages. This charge the court refused to give, and the defendant excepted."

The refusal to give this charge is now assigned for error.

CHARLES P. ROBINSON, for the appellant, contended, that an express refusal, on the part of the plaintiffs, to continue to furnish hams during the season, would certainly justify a refusal by the defendant to pay for those already furnished, and the recoupment of his damages; and that an inability to perform, as shown by the evidence, was tantamount to a refusal.

K. B. SEWALL, *contra*, made the following points:

1. The defendant's refusal to pay for the hams delivered to him on the 15th, 20th, and 24th August, was a breach of the contract on his part, and gave to the plaintiffs, who were then in no default, a right to abandon the contract, and to recover the price of the hams delivered.—Fletcher v. Cole, 23 Vermont R. 114; Pounds v. Baxter, 4 Greenl. 454; Dwinel v. Howard, 30 Maine R. 258; Allen v. Robinson, 2 Barb. (S. C.) 341; Martin v. Chapman, 3 Port. 344; Pharr v. Bachelor, 3 Ala. 240; Davis v. Wade, 4 *ib.* 208; Lord v. Belknap, 1 Cushing's R. 283; 6 English Law & Equity R. 230.

2. Rumor and information, as to plaintiffs' inability to perform their contract, whether believed or not, formed no excuse for defendant's breach of contract.

RICE, J.—"However technical rules are to be attended to, and in some cases cannot be dispensed with, yet, in administering justice, we must not lose sight of common sense; and the common sense of this case will not be found to militate against any rule of law."—Rawson v. Johnson, 1 East's Rep. 204.

No doubt can be entertained, that under the evidence disclosed in the record, the charge as asked by the appellant should have been given.—Tucker v. Woods, 12 Johns. R. 190; Judson v. Wass, 11 *ib.* 525; Wadlington v. Hill, 10 Smedes & Marsh. R. 560; Bank of Columbia v. Hagner, 1

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Peters' R. 465; Gardner v. King, 2 Iredell's R. 297; Jones v. Barkley, Doug. R. 659; Waterhouse v. Skinner, 2 Bos. & Pul. 447; 1 Saund. Pl. & Ev. 116; Thorpe v. Thorpe, 1 Salk. R. 171; Calonel v. Briggs, *ib.* 112; Langfort v. Adm'r of Tiler, *ib.* 113; Lancashire v. Killingworth, 2 *ib.* 623; Goodisson v. Nunn, 4 Term R. 761; Morton v. Lamb, 7 *ib.* 125; Rawson v. Johnson, *supra*; Powell on Contracts, 417, 418, 419; Marshal v. Craig, 1 Bibb's R. 379, 390; Carrell v. Collins, 2 *ib.* 429.

For the error of the court below in refusing the charge as asked, the judgment is reversed, and the cause remanded.

## EDMONDSON vs. WELSH AND WIFE.

[BILL IN EQUITY FOR ALLOTMENT OF DOWER.]

1. *What seizin of husband gives right to dower.*—To entitle the widow to dower in lands of which her husband was seized during the coverture, he must have been beneficially seized, though but for a moment, to his own use, and not as a mere conduit for passing the title.
2. *Admissibility of parol evidence to prove absolute deed a trust.*—It is the settled law of this State, that parol evidence is admissible to show that a deed, absolute on its face, was received in trust for a particular purpose, and that the vendee was a mere conduit for passing the title.
3. *Purchase by mortgagee at mortgage sale.*—If the mortgagee, through an agent, becomes himself the purchaser at the sale under the mortgage, the mortgagor may avoid the sale, but no other person can complain of it.
4. *Estoppel against denial of husband's seizin.*—Where the demandant's husband was the mere conduit for passing the title from his vendors as trustees back to them individually, a party deriving title from them is not estopped from showing that he had no beneficial seizin: his seizin is not thereby denied, but only explained.
5. *Evidence held sufficient to explain husband's seizin.*—The demandant's husband, on receiving a deed with covenants of warranty from the assignees of a mortgage, re-conveyed to them on the same day by quit-claim deed; and the subscribing witness to the deeds testified, that the husband purchased at the sale for the assignees, that no money passed between the parties, and that the transfer of deeds was intended to make good titles to the property: *Held*, that the evidence was sufficient to show that the husband had no beneficial seizin of the land.



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Edmondson v. Welsh and Wife.

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APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by the appellant, Mrs. Eliza Jane Edmondson, to enforce a claim to dower, as the widow of John Edmondson, deceased, in certain lots in the city of Montgomery, of which (as the bill alleged) said Edmondson was seized during the coverture, and which were in the defendants' possession at the filing of the bill. The bill and exhibits show that the lots were conveyed to Edmondson by Wilkinson & Hunt, by deed absolute on its face, with covenants of warranty, dated May 31, 1824; and that they were on the same day re-conveyed by Edmondson to Wilkinson & Hunt, by quit-claim deed. By a separate instrument attached to this quit-claim deed, Mrs. Edmondson released her right of dower in said lands to said Wilkinson & Hunt; and her relinquishment of dower was acknowledged, on private examination, before George H. Gibbs, clerk of the County Court of Montgomery. In relation to this relinquishment, however, the bill charges that it has no binding effect whatever, because the complainant was an infant at the time, and because the clerk of the County Court then had no authority to act in the premises.

The defendants answered the bill, and set up several distinct defences, of which it is only necessary to notice particularly that on which the case is here made to turn. They allege that Wilkinson & Hunt, who conveyed to Edmondson, were the assignees of a mortgage, with a power of sale, executed by one David A. Northrop; that the lots were sold under said mortgage, and were bid off by said Edmondson for said Wilkinson & Hunt; that Edmondson paid no money on his bid, but on the same day, on receiving the deed of Wilkinson & Hunt, and as part of the same transaction, re-conveyed them to said Wilkinson & Hunt by quit-claim deed; that Edmondson never had actual possession of the lots, never received the rents and profits thereof, and never had any beneficial interest in them; and the defendants plead these matters in bar of the relief sought. To sustain this defence, the defendants took the deposition of Justus Wyman, who was the subscribing witness to the two deeds, and who states,

from his recollection of what passed between the parties at the time of their execution, that Wilkinson held a mortgage, or deed of trust, under which said lots were sold, and were bought in for him by Edmondson; that he saw no money, or other consideration, pass between the parties, and "that the transfer of deeds was to make good titles to the property."

On final hearing, on bill, answer, exhibits, and proof, the chancellor dismissed the bill; and his decree is now assigned for error.

THOMAS WILLIAMS, for the appellant, made these points:—

1. Where the husband is beneficially seized, though but for a moment, his widow is entitled to dower.—3 Bla. Com. 132; Cro. Eliz. 503; Cro. Car. 190; Hardin's R. 482.

2. To establish a right to dower, a widow is not bound to show a chain of title in her husband, but seizin and possession are sufficient.—7 Dana, 173; 3 Rich. 63; 5 Cowen, 301; 11 Ala. 169.

3. Parol evidence cannot be received to create a secret trust against the express words of a deed, absolute on its face, purporting to be for valuable consideration, and containing covenants of warranty of title.—Stevens v. Cooper, 1 Johns. Ch. 429; Leman v. Whitley, 4 English Ch. 423; Squire v. Harder, 1 Paige, 494.

4. But, if parol evidence is receivable, the evidence in this case is insufficient; a single witness testifying to his recollection of facts which occurred twenty-six years previously.—Freeman v. Baldwin, 13 Ala. 246.

5. As the defendants claim under Wilkinson & Hunt, who claimed under Edmondson, they are estopped from denying his seizin.—Wooldridge v. Wilkins, 3 How. (Miss.) R. 360; Whitehead v. Middleton, 2 *ib.* 692; Hitchcock v. Harrington, 6 Johns. 290; Collins v. Torry, 7 *ib.* 280; Hitchcock v. Carpenter, 9 *ib.* 344; Plantt v. Payne, 2 Bailey, 319; Nason v. Allen, 6 Greenl. 244; Kimball v. Kimball, 2 *ib.* 226; Bancroft v. White, 1 Caines, 190.

NAT. HARRIS, *contra*, contended, among other things,—

1. That Edmondson's seizin, being merely transitory and as trustee for Wilkinson & Hunt, was not sufficient to entitle his

widow to dower.—4 Kent's Com. 38; 1 Lomax's Digest, 86, § 18; 1 Cruise's Digest (by Greenleaf), pp. 171-2, and cases cited; *Eslava v. Lepretre*, 21 Ala. 504; *Francis v. Garrard*, 18 *ib.* 794; *Small v. Proctor*, 15 Mass. 499; *Bisland v. Hewett*, 11 Sm. & Mar. 165; *Maybury v. Brien*, 15 Peters, 21.

2. Edmondson's purchase for Wilkinson & Hunt, at a sale made by themselves, was not void, but voidable only at the instance of the mortgagor, and valid as to all other persons. *Scott v. Freeland*, 7 Sm. & Mar. 409; *Bland v. Muncaster*, 24 Miss. 68.

CHILTON, C. J.—1. It is well settled that, to entitle the wife to dower, the husband must have been beneficially seized to his own use, during the coverture, of the land out of which it is claimed. If it be so vested but for a moment, provided the husband is not the mere conduit for passing the title, the right of dower attaches.—4 Kent's Com. 37-8, (ed. 1854); *Eslava v. Lepretre*, 21 Ala. 504; 1 Greenl. Cruise, 171-2, and notes.

2. It is also the settled law in this State, whatever it may be held elsewhere, that parol evidence is admissible to show the fraudulent use of a deed, or that a party receiving an absolute deed received it in trust for a particular purpose. The case of *Kennedy's Heirs & Executors v. Kennedy's Heirs*, 2 Ala. 271, is full to this point, and fully justifies the defendants in this case in proving that Edmondson was the mere conduit to pass the title of Wilkinson & Hunt, as trustees, back to them as individuals.

3. The deed to Edmondson was not void, but voidable at the election of the mortgagor. As he does not complain, it is not for any one else to set up that he is injured by reason of the trustees or mortgagees buying thus indirectly at their own sale.—See *Cunningham's Adm'r v. Rodgers*, 19 Ala. 149; *Saltmarsh v. Beene*, 4 Port. 283; 5 Vesey, 678.

4. The doctrine of estoppel does not apply in the case before us. If the husband was the mere conduit to pass the title, as we have above stated, he had no such seizin as entitles his widow to dower. The estate in him is in the same category as if it had vested in and out of him at the same instant; as in case of a sale and mortgage back, or where he

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merely executes a power of appointment. In short, when it is shown that, although the husband was seized, it was not beneficially, but as a naked trustee, the right to dower does not attach. The seizin, therefore, is not denied, but is so explained as to defeat the wife's claim.—See, as to estoppel in cases of dower, *Edmondson v. Montague*, 14 Ala. 370.

5. The proof of Justus Wyman (leaving out that portion of it objected to), he being a subscribing witness to the deeds from Wilkinson & Hunt to the demandant's husband, and from him back to them,—coupled with the fact that those deeds bear even date, and the surrounding circumstances, as also with the further fact that the conveyance from Edmondson to them is but a quit-claim,—very satisfactorily shows that Edmondson had no beneficial interest in the land—that he was a naked trustee, or mere conduit to pass the title to Wilkinson & Hunt.

Entertaining these views, it is unnecessary that we notice the other questions presented in the argument.

Decree affirmed.

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## GANTT vs. DOE EX DEM. COWAN.

[EJECTMENT.]

1. *Estoppel against setting up outstanding title.*—Where the plaintiff and defendant in ejectment derive title through mesne conveyances from the same vendor, there is no necessity for proof of title beyond him, and the defendant cannot set up an outstanding title in a third person; and that the plaintiff claims under a quit-claim deed, while the defendant claims under a subsequent purchase at execution sale, does not affect the principle, unless the defendant can show that the defendant in execution, after the execution of plaintiff's quit-claim deed, acquired a superior title.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.



THIS action was brought by Robert H. Cowan and Thomas Cowan, against Edward Gantt, for the recovery of a town lot in Selma. The title adduced by the plaintiffs was, 1st, a quit-claim deed from Jesse Beene to Jeremiah Pitman, dated January 14, 1837; 2d, a quit-claim deed from said Pitman to Thomas H. Cowan, dated January 24, 1838; 3d, a quit-claim deed from said Thomas H. Cowan to themselves, dated March 4, 1838; and, 4th, "oral testimony tending to show that the lot in controversy was the same lot mentioned in said several deeds, and that Jesse Beene was in the possession of the same at the time of his said sale to Pitman." The defendant then introduced and read to the jury the following documentary evidence of title: 1st, a patent from the United States to George Phillips and Wm. R. King, for the section of land embracing the lot in controversy, dated November 24, 1823; 2d, a deed from the coroner of Dallas county to Tarleton Woodall, for the lot in controversy, which had been sold under execution in favor of Jeremiah Pitman against Thomas H. Cowan and John F. Conoley, who was the sheriff of the county, dated October 6, 1845; and, 3d, a deed from said Woodall and wife to himself, dated February 18, 1847.

This being all the evidence, the court charged the jury,—

"That if they believed from the evidence that both the plaintiff and the defendant claimed title to said lot from Thomas H. Cowan, then the defendant would be precluded from setting up in defence an outstanding title in a third person."

The defendant excepted to this charge, and asked the following instructions:—

"1. That if the plaintiffs rely on a documentary title to said lot, they must show a connected chain of title from the United States Government to themselves, or they cannot recover.

"2. That if the defendant claims under a judicial sale, he can show an outstanding title in a third person.

"3. That if the plaintiffs claim under a quit-claim deed from Jesse Beene, the defendant can show an outstanding title in a third person—the patentees and their heirs."

The court refused these charges, and to each refusal the defendant excepted; and he now assigns for error the charge given, and the refusals to charge as requested.

GEO. W. GAYLE, for the appellant, contended,—

1. That the defendant could show an outstanding title in a third person, because the plaintiffs, holding under a quit-claim deed, had only a possessory title.—*Jackson v. Hubble*, 1 Cowen's R. 613; *Jackson v. Hill*, 5 Wend. 532. It is true that one who has had a prior possession may recover in ejectment; but when both parties (not being landlord and tenant) have nothing but a possessory title, there is nothing to prevent the ordinary defence of an outstanding title.

2. That the defendant was not estopped from setting up an outstanding title, by any act done by him with plaintiff, or by any relation existing between them.—*King v. Stephens*, 18 Ala. 475; *Badger v. Lyon*, 7 *ib.* 564; *Cox v. Davis*, 17 *ib.* 716; *Jackson v. Morse*, 16 Johns. 197.

3. The case of *Seabury v. Stewart & Easton*, 22 Ala. 207, has no application to this case, because the defendant, in effect, there occupied the position of tenant to the plaintiffs, and was estopped by the relation from setting up an outstanding title.

4. It is not shown that Beene, under whom plaintiffs claim, had any title, or exercised acts of ownership. The plaintiffs, therefore, were disseizors and trespassers against the legal owner, and cannot recover even of a trespasser.—*Bradstreet v. Huntington*, 5 Peters, 402; *Knox v. Kellock*, 14 Mass. 200; *Wolcott v. Knight*, 6 *ib.* 418; *Prop. Ken. Pur. v. Springer*, 4 *ib.* 416.

5. Thomas H. Cowan only held a possessory title, while the defendant was in possession, and held the coroner's deed. Ejectment cannot be maintained upon mere possession against adverse documentary title.—*Hallett v. Eslava*, 2 Stew. 115.

6. The plaintiffs, relying as they they did on documentary title, were bound to show a complete chain of title from the United States to themselves; and this they failed to do.—2 Stew. 115; 3 *ib.* 60; 1 *ib.* 298; *Stevens v. King*, 21 Ala. 429; *Brock v. Yongue*, 4 *ib.* 387; *Hines v. Greenlee*, 3 *ib.* 73; 2 Port. 280.

WM. M. BYRD, *contra*, contended that, where the plaintiff and defendant claim through the same source, or a common vendor, the defendant is estopped from setting up an out-

standing title, and the plaintiff is relieved from the necessity of tracing his title back beyond the common vendor; and cited the following cases: Pollard v. Cocke, 19 Ala. 188; Seabury v. Stewart & Easton, 22 *ib.* 207; Cooper v. Galbreath, 3 Wash. C. C. 549.

CHILTON, C. J.—The defendant claimed the land in this case under a purchase made at a sale by the coroner, in virtue of an execution against Thomas H. Cowan and another. The land was levied on, as appears by the recitals in the deed, as the property of said Cowan,—was sold as his property, and conveyed by the coroner to Woodall, the purchaser, who conveyed to Gantt, the defendant.

The plaintiff also claims the same lot by conveyance from Thomas H. Cowan, through mesne conveyances to himself. The case, therefore, is a very plain one. As both parties claim through Thos. H. Cowan, the defendant by purchase under execution, they admit the title of Cowan, and there was no necessity for proof of title beyond their common vendor. The coroner could only sell a legal title; and the acceptance of a deed under the purchase, and relying upon it as evidence of title, was an admission by the defendant that Cowan was seized of a legal title. The only inquiry, then, was, which of the parties had obtained the legal title from such common vendor. That the plaintiff claimed by quitclaim deed, does not alter the principle, unless the party claiming to hold by a subsequent conveyance from the same grantor should be able to prove that such grantor acquired a title in the meantime superior to that conveyed to the plaintiff. Nothing of the kind is shown here; and as the charge which the court gave properly presented this question to the jury, the charges asked by the defendant, which conflicted with it, were properly refused.—See Brock v. Yongue, 4 Ala. 584; Pollard v. Cocke, 19 *ib.* 188, and cases there cited; Seabury v. Stewart, 22 *ib.* 207.

The law will refer the possession of the defendant to the title which he sets up for its protection; and as he claims under a title derived from Cowan, the plaintiff's vendor, and holds possession under that title, he cannot be allowed to say that Cowan had no title, but that it is in a third party, with

whose title he stands in no wise connected.—See cases above cited ; also, Jackson, *ex dem.* Brown, v. Hinman, 10 Johns. R. 292 ; Jackson v. Harper, 5 Wend. 246 ; Jackson v. Murray, 12 Johns. 201 ; 13 *ib.* 316 ; *ib.* 433 ; Jackson v. Tuttle, 9 Cow. R. 233 ; Jackson v. Walker, 7 *ib.* 637.

Judgment affirmed.

### GARRETT ET AL. vs. LYLE.

[BILL IN EQUITY TO OBTAIN DIVESTITURE OF LEGAL TITLE TO LAND, AND TO ENJOIN ACTION AT LAW FOR ITS RECOVERY.]

1. *Rule that plaintiff must recover on strength of his own title.*—Although, in equity, as well as at law, a plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's ; yet it is not necessary that he should show a good title against all the world, but it is enough that he shows a right to recover against the defendant.
2. *Estoppel against denying validity of judicial proceedings by claiming title under them.* Where the plaintiff and defendant both derive title from a purchaser at an administrator's sale, made under an order of the probate court, the defendant is estopped from denying the validity of the proceedings connected with the sale.
3. *Purchaser of land in possession of third person affected with notice.*—Where one purchases land in the possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights binding on his vendor.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. W. W. MASON.

THIS bill was filed by Thomas G. Lyle against John Garrett, Bartholemew B. Moore, Allen McWalker, and the heirs-at-law of William Vann, deceased ; and its object was, to obtain a divestiture of the legal title to a certain tract of land, and a perpetual injunction of an action at law instituted for its recovery. It alleges, that the said tract of land was allotted and set apart, under the treaty between the United States and the Creek Indians, to an Indian woman by the name of Sally, as her reservation, and she was duly located on it ;



that said Indian afterwards died in possession of said land, having never sold or otherwise disposed of it ; that letters of administration on her estate were granted by the Orphans' Court of Chambers, in which county said lands were situated, to one Gresham, who afterwards, as administrator, petitioned said court for an order of sale of said lands ; that on the first Monday in August, 1835, said court granted an order of sale, and appointed three commissioners to conduct the sale ; that the commissioners, pursuant to the order of sale, proceeded to sell said lands, on the 3d October, 1835, at public auction, and one William Vann became the purchaser, through one Bonner as his agent, for the sum of \$827 ; that the commissioners made their report of the sale to said court, showing that Bonner was the purchaser, but they afterwards rectified their report so as to show that Vann was the real purchaser ; that Vann paid the purchase money to the commissioners, who paid it to the clerk of the court, who paid it to the administrator ; and that said court, in July, 1837, decreed that said commissioners should convey the land to said Vann.

The bill further alleges, that said Vann entered into possession of said lands, and on the 25th January, 1836, sold them to Allen McWalker, and executed to him a written instrument, under seal, which recited the said sale, and was conditioned that Vann should refund the purchase money if he failed to obtain for McWalker sufficient titles for said land ; that McWalker paid the purchase money, went into possession of the land, erected valuable improvements thereon, and on the 8th November, 1845, sold said land to complainant, and executed to him his bond for titles ; and that complainant paid the purchase money, entered into possession of the land, has remained in possession thereof from that time up to the filing of his bill, and has erected valuable improvements thereon.

It is then alleged, that said Vann, in November, 1841, having in the meantime become insolvent, again sold said lands to said B. B. Moore ; that this sale, though purporting to be for value received, was in fact fraudulent, and was intended to defeat his previous sale to McWalker, who, as was well known to said Moore, was then in the adverse possession of the lands ; that Vann died some time in 1843, and in February, 1846, said Moore conveyed said lands to his co-defend-

ant John Garrett, under (as complainant charges) some champertous agreement to divide the spoils between them; that Moore and Garrett, in pursuance of their fraudulent agreement, on the 17th day of August, 1846, procured a deed to be made by said commissioners to said Vann, who had then been dead about three years; that said Garrett, by a fraudulent use of the said deed, together with the conveyances by said Vann to Moore, and by Moore to himself, procured a patent for said lands from the United States Government on the 14th December, 1846, which he is now setting up as valid against complainant; and that he has instituted suit against complainant, in the Circuit Court of Chambers, for the recovery of said lands.

A transcript of the proceedings of the Orphans' Court in the matter of the sale of the land, and copies of all the conveyances, title-bonds, &c., are appended as exhibits to the bill; and the prayer is, that the legal title to said land may be divested out of said Garrett, or that he may be declared a trustee for complainant,—that the action at law may be perpetually enjoined, and for general relief.

The defendants Moore and Garrett filed separate answers to the bill, but they are in substance the same. They deny specifically all the allegations of fraud; admit that the land belonged to the said Indian as her reservation, was sold under an order of the Orphans' Court, and was bought by said Bonner for Vann; deny all knowledge of the alleged sales from Vann to McWalker, and from the latter to complainant, as also of the accompanying adverse possession; and allege that Vann, on the 17th October, 1835, previous to the alleged sale to McWalker, being indebted to Moore, sold said lands to him, and executed to him a title-bond of that date, and that the subsequent conveyance in 1841 was only carrying out this contract.

The record is very voluminous, but the view here taken of the case renders it unnecessary to state the evidence. On final hearing, on bill, answer, exhibits, and proof, the chancellor granted the relief sought by the bill; and his decree is now assigned for error.

L. E. PARSONS, with whom was D. CLOPTON, for appellants,

contended that the proceedings of the Orphans' Court, under which the complainant derived title, were void for want of jurisdiction; and made these additional points:

1. That it is the settled rule in equity, as at law, that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's title.—*Antonez v. Es-lava*, 9 Port. 537; *Pickens v. Harper*, 1 Sm. & Mar. Ch. 539.

2. That the defendants are not estopped from showing that Lyle has no sufficient equitable right on which to found his claim for relief. A grantee is permitted to show that his grantor was not seized, as is every day allowed in actions of covenant.—*Small v. Procter*, 15 Mass. 499. Where the truth appears by the same record, as it does here, a man shall not be estopped.—*Co. Litt.* 352 b; *Plowd.* 134, 422; *Comyn's Digest*, tit. Estoppel (E, 2); *Sinclair v. Jackson*, 8 Cowen's R. 586. The proceedings of the Orphans' Court being void, the recital of them in the patent cannot operate as an estoppel.—*Kercheval v. Triplett's Heirs*, 1 A. K. Mar. 495–6. Since the patent is the deed (not of Garrett, but) of the United States, it cannot operate to estop him from denying that the grantor had title.—*Winlock v. Hardy*, 4 Litt. 274. Estoppels must be mutual, which this is not; neither did Garrett procure the order of sale, or induce either McWalker or Lyle to purchase.—*Stone v. Brittan*, 22 Ala. 547. The case of *Cocke v. Pollard*, 19 Ala. 192, does not militate against this view, since we here show (what the court there say must be shown) that the heirs of the Indian have the title.

JAS. E. BELSER, *contra*, insisted that the defendants in the court below were estopped from denying the validity of the proceedings of the Orphans' Court, and cited *Lamkin v. Reese*, 7 Ala. 170; *Cocke v. Pollard*, 19 *ib.* 192.

NOTE BY REPORTER.—Many other points are raised on the record, and argued on the briefs of the respective counsel; but they have no connection with the points decided by the court, and are therefore omitted.

GOLDTHWAITE, J.—We do not consider it at all necessary to investigate the validity of the proceedings of the Orphans' Court in relation to the sale of the land, for the reason,

that Moore and Garrett, from the position which they occupy, cannot be allowed to question their correctness. We do not deny, that in equity, as well as at law, the plaintiff must recover on the strength of his own title ; but because this is the rule, it does not follow that he must show a good title against all the world. It is enough that he shows a right to recover against the defendant ; and there are many cases in which he has this right, although another person might recover it from him.

Considering the case without reference to the alleged sale from Vann to Moore, in 1835, the facts disclosed by the record are, that Vann bought the land at an administrator's sale had under the proceedings of the Orphans' Court ; that in 1836 he sold, and executed his bond for titles, to McWalker, who paid the purchase money, and went into possession. The complainant Lyle asserts his right to the land under a subsequent purchase from McWalker, as set out in his title bond. In 1841, while McWalker was in possession under his purchase, Vann sold to Moore, executing to him a writing reciting the sale, not under seal. This writing, in 1846, Moore assigned to Garrett, under an agreement with him, that he should obtain a patent from the United States ; and if he obtained it, Garrett was to keep the land, and pay Moore one half its value. The pleadings admit that Garrett obtained the patent by virtue of the sale had under the proceedings of the Orphans' Court ; and having done this, he attempts to support the title thus obtained, against the prior equity of McWalker based upon the same proceedings, by asserting that they are void.

Upon the mere statement of the proposition, it is so manifestly opposed to natural equity, that it would require the strongest array of authority to support it. The doctrine of estoppel has its origin in reason and justice, and the principles on which it is founded apply equally to the admission of judicial proceedings as any other act or admissions ; and that such proceedings are void, does not in the slightest degree affect the question as to the right of the party who has secured an advantage to himself, or changed the condition of others by asserting their validity, to be allowed to deny them. A party may be estopped from denying the validity of a void



deed.—Drane v. Gregory, 3 B. Mon. 619. A purchaser at administrator's sale is estopped from showing its illegality, while he retains possession of the property sued for under the sale.—Harbin v. Levi, 6 Ala. 399. The principle on which these decisions rest, is the same which must govern in the one under consideration. The title of Garrett has no other foundation than the sale of the land under the proceedings of the Orphans' Court. In obtaining and accepting the patent, he recognized its validity ; and this title he is using to eject one who claims under the same sale, and by a prior and superior equity. He cannot do this, without denying the validity of the sale upon which his own title is founded, and this the policy of the law will not allow : it would be virtually permitting him to disparage the title under which he asserts his right.

The view we have taken is decisive of the case, in the aspect in which we have considered it, as it throws the equity of the appellants, Garrett and Moore, upon the sale made to the latter in 1841 ; and as between that sale, and the prior purchase made by McWalker, the last must prevail. The rule is, that where one purchases land in the possession of a third party, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights binding on the vendor.

In relation to the alleged sale to Moore in 1835, it is only necessary to say, that the burden of proof devolved on them. The testimony not only fails to show that any such sale was made, but there is a clear preponderance of evidence to the fact that the written contract of sale which is set up by the parties was a fabrication, got up by Vann and Moore for the purpose of defrauding McWalker,—made after the sale, and antedated in order to accomplish the fraud.

The decree is affirmed, and Moore and Garrett must pay the costs of the appeal.

## GODBOLD vs. BLAIR &amp; CO.

[ACTION UNDER CODE ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Amendment of complaint.*—When suit is brought in the name of a firm, on an open account for goods sold and delivered, if the evidence shows that a party not joined was a partner in the firm at the time the account was contracted, the complaint may be amended (Code, § 2403) by adding his name.
2. *Proof of merchant's account by parol testimony of clerk and by his books.*—A merchant's books are not admissible evidence for him, in a suit on an account, except by the defendant's consent: nor, conceding their admissibility, would they be higher or better evidence than the positive testimony of his clerk, who swears to the sale and delivery of the articles, although he cannot recollect their dates, and has never compared the account with the books.
3. *Charge requiring explanation erroneous.*—A charge asked, which, to prevent it from misleading the jury, requires to be qualified or explained, may properly be refused.
4. *Sufficiency of evidence to authorize recovery.*—Positive certainty is not ordinarily attainable in actions on open accounts: if the jury are reasonably satisfied from the evidence of the existence of the facts which constitute the alleged indebtedness, it is sufficient to authorize a recovery by the plaintiff.

APPEAL from the Circuit Court of Baldwin.

Tried before the Hon. CHARLES W. RAPIER.

THIS action was brought by Henry D. Blair, trading under the name and style of H. D. Blair & Co., against C. M. Godbold, to recover the amount of an open account for goods, wares, and merchandize sold and delivered by plaintiff to defendant previous to the 20th day of April, 1854.

“The only witness introduced by plaintiffs to sustain their action, was one S. F. Freeman, who testified, that he was and had been the plaintiff's clerk; that the account sued on was correct; that he sold and delivered to the defendant the goods charged in said account, and that the sum sued for was still due and unpaid. Upon his cross-examination by defendant's counsel, he said, that the account shown and sued on in this case was not in his handwriting; that he did not compare said account with plaintiffs' books; that he could not, unless he had the entries he had made in plaintiffs' books to

refer to, to refresh his recollection, state at what dates the particular items in said account were sold and delivered to defendant; that he did not bring the books, because he did not know they would be wanted; that he could not, without said books, state whether the items mentioned in said account were sold and delivered to the defendant on the dates specified in the account; that a portion of the goods charged in said account were sent to the defendant on his written orders; that he had never seen the defendant write; that he had not said orders with him, nor could he recollect what items in the account were sold upon said written orders; and that he could not designate from memory any particular item in the account as having been sold and delivered to the defendant on the dates mentioned in said account. Upon his re-examination by plaintiffs' counsel, the witness stated, that though he could not recollect the particular dates on which the items in said account had been sold and delivered to defendant, yet he knew that said account was correct,—that all the items stated had been sold and delivered to the defendant, and that the amount sued for was due by defendant to plaintiffs.

“This was all the evidence in the cause; and upon this evidence the defendant asked the court to charge the jury, ‘that they must be satisfied from the proof that the goods charged in the account were sold and delivered to the defendant, or the plaintiffs could not recover’; which charge the court gave. The defendant further asked the court to charge, ‘that what the witness said in reference to the books and orders was not evidence to prove the account sued on—that the books and orders were the best evidence, and should have been produced’. This charge the court refused, because the evidence as to the books and orders had been elicited by the defendant's counsel, on his cross-examination of the witness, and had permitted said evidence to go to the jury without objection on his part; and further charged the jury, that if they were reasonably satisfied from the proof that the goods had been sold and delivered to the defendant by the plaintiffs, they should find for the plaintiffs. To the refusal to charge as asked, and to the charge given, the defendant excepted.”

“ After the plaintiff had closed his evidence, it having been disclosed upon the cross-examination of the plaintiffs’ witness by the defendant’s counsel that the firm of H. D. Blair & Co., at the time the debt sued for was contracted, was composed of said Henry D. Blair and David S. Sedberry, as copartners under the name and style of H. D. Blair & Co., the defendant moved to exclude the evidence from the jury; but the court, upon the plaintiffs’ counsel asking leave to amend the summons and complaint by making said Sedberry a party plaintiff, refused to exclude the evidence from the jury, and allowed the proposed amendment. The defendant objected to this, and, his objection having been overruled, excepted.”

These rulings of the court are now assigned for error.

WM. BOYLES, for the appellant.

A. R. MANNING, *contra*.

CHILTON, C. J.—Section  $\frac{1}{2}$  403 of the Code invests the court with ample power to permit an amendment of the complaint by striking out or adding new parties plaintiff or defendant. There was, therefore, no error in allowing the plaintiff to amend the complaint by inserting the name of Sedberry as composing, with Blair, the firm of H. D. Blair & Co.

The witness proved the sale and delivery of the goods, the price of which was sued for, by the plaintiff to the defendant. He could not, however, remember the dates. Upon cross-examination he stated, that he never had compared the account with the books. He also testified, that some of the goods were furnished on written orders from the defendant, but he had never seen the defendant write. Neither the books of account, nor the orders, were produced. The defendant asked the court to charge the jury, “ that they must be satisfied from the evidence that the goods charged in the account were sold and delivered to the defendant, or the plaintiff could not recover.” This charge the court gave. He then asked the further charge, “ that what the witness said in reference to the books and orders was not evidence to prove the account sued upon—that the books and orders were the best evidence, and should have been produced.”

It may be conceded, that the evidence of the books and or-



ders, upon a proper application, should have been ruled out, although elicited by the defendant and allowed to go to the jury without objection; and yet the court below did not err in refusing this charge. It asked more than the exclusion of the evidence of the books and orders, in that (at least indirectly) it sought to raise a presumption adverse to the plaintiffs by reason of their not producing the books, &c. The latter part of the charge asked was erroneous, as it assumed that the books were the best evidence; whereas they were not admissible as evidence at all, except by the consent of the defendant. But, if we concede they were evidence, they constituted no higher evidence of the sale and delivery of the goods, than the positive proof of the witness, who testifies to their sale and delivery. Aside, however, from this, the charge was improper in another aspect. If it had been given, the jury might well have inferred, as the best evidence had been suppressed, that they should disregard the evidence of the sale and delivery and find for the defendant. And the court, in order to prevent such charge from misleading them, must have gone farther, and have told them, that although the books and orders were higher and better evidence of their contents than parol proof of what they contained, still, if the jury believed the goods had actually been sold and delivered, and remained unpaid for, the plaintiff was entitled to recover, although they were not produced. The rule is, that where a charge as asked requires to be qualified, or explained, to prevent it from misleading the jury, it may properly be refused.—*Swallow v. The State*, 22 Ala. R. 20; *Ross v. Ross*, 21 *ib.* 322.

No objection has been pointed out to the affirmative charge, that if the jury were reasonably satisfied that the goods were sold and delivered to the defendant by the plaintiff, they should find for the plaintiff. We see no error in this charge. Positive certainty is ordinarily not attainable in such cases. It is sufficient if the jury, as reasonable men, are satisfied as to the existence of the facts which constitute the indebtedness.—*Hopper v. Ashley*, 15 Ala. R. 457.

Judgment affirmed.

## BRADLEY vs. ADDRESS.

[APPLICATION FOR REVOCATION OF LETTERS OF ADMINISTRATION AND RE-PROBATE OF NUNCUPATIVE WILL.]

1. *Conclusiveness of former adjudication revoking probate of will.*—Where a nuncupative will, admitted to probate without due notice to those entitled to it, is afterwards declared null and void by a decree of the same court on their petition, and an administrator of the estate appointed; and this decree is afterwards affirmed on error, on appeal sued out by the person to whom the property was bequeathed by the will, he is barred from prosecuting another petition in the same court for the re-probate of the will.

APPEAL from the Court of Probate of Monroe.

IN THE MATTER of the estate of Martha Address, deceased.

Stephen D. Address, the appellee, filed his petition in the Probate Court, in May, 1854, alleging that, in March, 1852, said Martha Address, then the wife of the petitioner, departed this life, being possessed in her own right of property to the amount of several hundred dollars in value; that she made a nuncupative will, bequeathing all her property to the petitioner; that said will was admitted to probate by said court, on the 9th August, 1852; that at the November term of said court, 1852, on the petition of one Nathaniel W. Broughton and others, the order admitting said will to probate was set aside, and letters of administration on the estate of said Martha were granted to one Jesse G. Bradley. The petition then sets out the names of the heirs-at-law of said Martha, and prays that Broughton's letters of administration may be revoked, and that said nuncupative will may be again admitted to probate.

On the day set for the hearing of this petition, the appellant, who was one of the heirs-at-law of said decedent, appeared, and filed three pleas to the petition, the first of which was as follows:—

“1. That the prayer of the said petition should not be granted, because heretofore, at the November term of said court, 1852, a petition was filed in said court by said N. W. Broughton and others (the same persons who are made de-

fendants to this petition, and who are the heirs and distributees of said Martha Andress, deceased), to set aside the probate of said nuncupative will theretofore granted by said court, and for letters of administration to issue on the estate of said Martha; and such proceedings were thereupon had in said court, at the December term thereof, 1852, that the probate of said pretended will was set aside, and said pretended will held to be null and void, and letters of administration on said estate were granted to Jesse G. Bradley. Which said decree of said court was taken by the said petitioner, by appeal, to the Supreme Court of Alabama, and was by said Supreme Court, at its January term, 1854, in all things affirmed; and said decree of said Probate Court still stands, in full force and effect."

The petitioner demurred to this plea, and the court sustained his demurrer; and issue being joined on another plea, the court, on the evidence adduced, rendered a decree, revoking Bradley's letters of administration, and again admitting said will to probate. From this decree Bradley now appeals, and here assigns for error, with other things, the sustaining of the demurrer to his first plea, and the rendition of the decree as above stated.

S. J. CUMMING, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

RICE, J.—It is settled in this State, that when a will has been admitted to probate, without notice to those who are entitled to it, the Probate Court is authorized to set aside the probate, on their petition.—*Roy v. Segrist*, 19 Ala. 810, and cases therein cited.

If, on such petition, the Probate Court not only sets aside the probate, which had been allowed without notice to those entitled to it, but holds "the pretended will to be null and void", and grants letters of administration on the estate of the decedent; and an appeal is taken from this decree to the Supreme Court, by the man to whom all the property of the decedent was given by the provisions of the will; and on such appeal the decree is affirmed,—*he* is thereby barred from prosecuting a petition afterwards filed in the Probate Court,

to cause said will to be "again admitted to probate."—*Laughton v. Atkins*, 1 Pick. R. 535.

The petition of the appellee is not an application for the removal of the administrator, under sections 1696, 1697, 1698 and 1699 of the Code. It does not state any of the causes for his removal specified in any of those sections. It prays that the letters of administration be set aside. This prayer could be granted, if the will were "again admitted to probate", but not on any other ground shown in the petition. And as the petitioner has no right to have the will again admitted to probate, if the first plea of the appellant is true and remains unanswered, he has not disclosed any right to have the letters of administration set aside.

The matter set forth in the first plea constitutes (*prima facie*, at least) a bar to the right asserted in the petition of the appellee. The court below erred in sustaining the demurrer to that plea. And as this may be decisive of the case, we reverse the decree for that error, and remand the cause, without deciding the other questions not embraced by what we have above declared.

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## WILLIAMS vs. STURDEVANT.

[BILL IN EQUITY FOR RESCISSION OF CONTRACT ON GROUND OF FRAUD.]

1. *Variance between allegations and proof.*—When a bill is filed to obtain the rescission of a contract on the ground of fraud, while the evidence shows only an honest mistake, the variance between the allegations and proof is fatal.
2. *Costs.*—The bill in this case having been dismissed on account of a variance between the allegations and proof, the costs were imposed on the complainant, because he had manifested a desire by no means commendable to get rid of his bargain, when only a small portion of the land, of which he retained undisturbed possession, had (through mistake) been omitted from his conveyance, and his vendor was solvent.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. WADE KEYES.



THIS bill was filed by the appellant, John S. Williams, against Willis Sturdevant, to obtain the rescission of a contract for the purchase of a large tract of land, on the ground of fraud on the part of the vendor. The entire tract purchased contained about five hundred and fifty acres, of which a forty-acre tract was omitted from the conveyance. The bill alleges that this omission was fraudulent—that the vendor, as he well knew at the time of the contract, did not have the legal title to this tract, and knowingly concealed that fact from the complainant; and that when complainant, on discovering the defect in his conveyance, applied to said Sturdevant for the re-payment *pro rata* of the purchase money, the latter confessed that he had knowingly sold the land when he had not the legal title. It further alleges, that the legal title to said tract is in one Jesse Reeves, who was defendant's vendor; that an execution against said Reeves has been levied on the tract; that complainant, since the levy of the execution, has tendered back the land, and demanded a rescission of the contract; and that defendant has refused to rescind.

The defendant answered the bill; admitting the contract of sale as alleged, and denying all the allegations of fraud. He states that he purchased all the lands from said Reeves, and received his conveyance for the same; that when he sold the lands to complainant he supposed that he had the legal title to the entire tract; that he is an illiterate man—not being able to read or write; that the forty-acre tract in dispute was, through mistake, omitted out of the deed from said Reeves to himself, and the mistake was afterwards carried into his deed to complainant,—the description of the land being copied from one deed into the other; that he knew nothing of the mistake until informed of it by complainant a short time before the filing of the bill; that complainant only informed him that there was a mistake, without pointing it out, and insisted on a rescission of the entire contract; that so soon as he ascertained, through the assistance of a friend, in what the mistake consisted, he immediately had a corrected deed prepared, and despatched a messenger with it to said Reeves, who had removed to Arkansas; that Reeves signed the corrected deed, conveying said tract of land to res-

pendent, who then executed a corrected deed to complainant, and tendered it to him. And these corrected deeds are made exhibits to the answer.

The contract of sale was made in October, 1846, and the bill was filed in May, 1850 ; while the corrected deeds exhibited with the answer bear date the 14th June and 15th July, 1850. The testimony in the case fully sustains the allegations of the answer as to the mistake and omission in the description of the land. It was admitted, as appears from an agreement of record, that a judgment creditor of said Reeves had levied on the land, that he was enjoined by the defendant, and that the injunction suit was still pending and undecided when this cause was heard. On final hearing, the chancellor dismissed the bill, and his decree is now assigned for error.

WATTS, JUDGE & JACKSON, for the appellant, contended,—

1. That the contract between the parties was entire, and could not be severed without consent ; and the appellant was therefore entitled to the whole of the lands purchased, and might refuse to take a part only.

2. That the corrected deed of Reeves could not convey a good title, because his creditors had acquired liens on the land by actual levies. The interposition of chancery was necessary ; and when this cause was heard, the power of that court, though invoked, had not been exercised ; and on final hearing, if the court should refuse the injunction, the land will be sold. The chancellor, therefore, should have either decreed a rescission of the contract, or should have continued the case until the suit against the attaching creditor was disposed of.

3. There is no proof in the record that the deeds ever were corrected. The exhibits, purporting to be copies of the corrected deeds, are not shown to have been proved, or even offered in evidence.

4. If the dismissal of the bill was correct, the costs should have been awarded against the defendant, because the complainant had just cause for filing his bill ; and if the title was ever perfected, it was not done until after the bill was filed. The decree, therefore, even if affirmed, should be varied as

to the costs.—Alexander v. Alexander, 5 Ala. 517; Gray v. Gray, 15 *ib.* 779.

B. WILLIAMSON, *contra*, contended, among other things, that the variance between the allegations and proof was fatal to the relief sought by the bill; and cited the following cases: Pierce v. Brassfield, 9 Ala. 973; Graham v. Tankersley, 15 *ib.* 634; Julian v. Reynolds, 11 *ib.* 960; Ansley v. Robinson, 16 *ib.* 793.

CHILTON, C. J.—The chancellor, in our opinion, very properly dismissed the bill in this case. Its title to relief is, an alleged palpable fraud in selling land by defendant to complainant, to which defendant had no title, and which fraud, the bill charges, was afterwards admitted by the defendant. Both the answer and the proof show that there was no pretext for such an allegation. On the contrary, the defect in the legal title to a very inconsiderable portion of the entire tract was occasioned by an innocent mistake in the deed from Reeves to the appellee, which was carried into his deed to the appellant. This mistake was promptly corrected by the appellee, as soon as his attention was called to it, in procuring a corrected deed from his vendor, Reeves, and in the execution of a correct one to the appellant. The creditors of Reeves have no right in equity, upon the facts here disclosed, to interfere with this fraction of land, and it appears the appropriate remedy has been resorted to for the purpose of enjoining them. Had the appellant alleged the mistake, and made Reeves and the attaching creditors parties, as well as the appellee, he would, under the facts disclosed by the answer and proof, have clearly entitled himself to a correction of the conveyances, thus perfecting his title by remedying the mistake. He would, doubtless, in such case, have been protected in the cost. But he has not seen proper to do this. He has chosen to set up fraud as a ground of being relieved from the entire contract. He has failed in this, and upon his allegations he can have no relief. He must recover, if at all, upon the case made by the bill.—See McKinley v. Irvine, 13 Ala. 681; Wiley Banks & Co. v. Knight, at the present term, and cases cited.

We do not regard this as a case in which the appellant should recover costs. He has evidently manifested a desire, which is by no means commendable, to get rid of his bargain, the ground of complaint being, at the most, a very small matter, and one which could readily have been remedied. He has never been disturbed in the quiet enjoyment of all the land he purchased, and all the while has had a solvent vendor to stand between him and any danger to which he was exposed by reason of failure or want of title. Upon the whole, we think the decree should be affirmed, and the appellant should be taxed with all the costs.

Decree affirmed.

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### FOSTER vs. RODGERS.

[ASSUMPSIT ON BREACH OF WARRANTY OF QUALITY OF COTTON SOLD.]

1. *Measure of damages for breach of warranty of quality.*—On a breach of warranty as to the quality of an article sold, the purchaser is entitled to recover, *at least*, the difference between its actual value and what would have been its value as warranted; but, since the jury may also allow interest on that sum, the court may properly refuse to instruct them, that that difference in value is the measure of damages.
2. *Evidence of value at time and place of sale.*—Where cotton, bought by sample in Montgomery, Alabama, in January, was shipped to New Orleans, and there re-sold at public auction in May, after notice to the vendor, the price brought at the re-sale may be looked to by the jury in determining the actual value in Montgomery at the time of the sale, when the other evidence in the cause shows the value of the sampled cotton in Montgomery at the time of sale, in New Orleans at the time of re-sale, and that the relative value of the sampled and damaged cotton was the same in both places.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Thomas T. Rodgers against William Foster, in September, 1851, to recover damages for a breach of warranty in the sale of fifty-two bales of cotton. The bill of exceptions is as follows :



“On the trial of this cause, the plaintiff proved, that the defendant, on the 9th January, 1851, in the city of Montgomery, sold to him fifty-two bales of cotton, then in the warehouse of John H. Murphy in said city, for which he paid him 12½ cents per pound, making in the aggregate \$3,624; that said cotton was sold and purchased by the samples, and that the samples by which it was sold indicated it to be of the quality which is usually designated by cotton-dealers as ‘strictly good middling to middling fair’; and that said cotton, on the 10th February, 1851, was shipped by steamboat from Montgomery to the city of New Orleans. The plaintiff then read the depositions of several witnesses (experts), whom he had examined in said city of New Orleans under commissions, and who testified, that said cotton was received in New Orleans on the 15th February, 1851; that at the time of its arrival it appeared externally to be in good condition, but that shortly afterwards, on examination, it was discovered that the cotton in the middle of the bales, beyond the reach of the sampler, was wet and worthless; and they gave it as their opinion, that it was what is commonly called ‘water-packed’, and must have been in a damaged condition at the time of the sale from the defendant to the plaintiff. The same witnesses testified, also, that cotton, such as the samples which the plaintiff purchased indicated that to be, was worth, in said city of New Orleans, on the 9th January, 1851, 19½ cents per pound; on the 5th February, 1851, 12½ cents per pound; on the last of February, 10¼ cents per pound; on the 10th March, 10½ to 10¼ cents per pound; on the 2d of April, 10¾ to 10½ cents per pound; on the 30th April, 9½ cents per pound; and on the 4th and 5th May, 9½ to 9¾ cents per pound; and that on said 5th May, 1851, said cotton was sold in said city of New Orleans, at public outcry, after one advertisement in the New Orleans papers, and brought the sum of \$836. The plaintiff further proved, that the defendant, who lived in Macon county in this State, had reasonable notice of said sale in New Orleans before it took place.

“The defendant introduced evidence to the jury, conducing to prove that said cotton was not water-packed, that no water whatever was used in the packing of it, and that the damage to it occurred from other causes, and after the sale by him to

the plaintiff. He also proved that, within a very short time after he sold said cotton to the plaintiff, the price of cotton in Montgomery declined, and continued to decline gradually up to 5th May, 1851, when it was some three or four cents lower than it was on the day of the said sale. It was in proof, also, that cotton was from three-fourths to one cent per pound higher generally in New Orleans than in Montgomery. There was no proof that plaintiff bought said cotton to be shipped, or to be sold in any other market than Montgomery; nor was there any proof of any usage in Montgomery in that particular. The testimony of the plaintiff's witnesses, so far as they testified to the price of cotton in New Orleans at the several dates stated, and as to the price for which said cotton was actually sold on the 5th May, 1851, in New Orleans, was objected to by the defendant, but was allowed to go before the jury, under an agreement and understanding between the counsel of the parties and the court, that the court should hold it subject to its ruling, and should instruct the jury as to the weight and legal effect to be given to it.

"The defendant's counsel requested the court to charge as follows:—

"1. That if the jury should find for the plaintiff, the measure of damages is the difference between the value of the cotton at Montgomery on the day of its sale by the defendant to the plaintiff, if it had conformed to the samples, and its value at the same time and place in its then damaged condition.

"2. That in ascertaining the difference in the value of the cotton on the 9th day of January, 1851, at Montgomery, had it conformed to the samples, and in its damaged condition, the jury cannot look to its value in its damaged condition in New Orleans on the 5th May, 1851.

"3. That the jury cannot look to the price for which it sold in New Orleans on the 5th May, 1851, for any purpose."

These charges the court refused, and to each refusal the defendant excepted; and he now assigns them for error.

CLOPTON & LIGON and N. W. COCKE, for appellant:

1. The court erred in refusing the first charge asked, as to the measure of damages for the breach of a warranty in the sale of a chattel.—*Marshall v. Wood*, 16 Ala. 812; *Kornegay*

v. White, 10 *ib.* 255; Marshall v. Gantt, 15 *ib.* 686; Worthy, Brown & Co. v. Patterson, 20 *ib.* 174. The allowance of interest, in such cases, is a matter within the discretion of the jury, and the plaintiff is not entitled to it as a matter of right. As to the difference between cases in which the allowance of interest is a legal right, and cases in which it is discretionary with the jury, see *McIlvaine v. Williams*, 12 N. H. 475. As a general rule, interest is not recoverable on unliquidated demands.—*Sedgwick on Measure of Damages*, 395; *Gilpin v. Consequa*, Peters' C. C. R. 85; *Dox v. Dey*, 3 Wend. 361. In no case has it been held, in an action for a breach of warranty, that interest was necessarily included. The charge asked, therefore, should have been given. It did not become the defendant to ask the court to instruct the jury that they might or must allow interest; but the plaintiff, if he desired any instructions on that point, should have requested them.

2. The second and third charges asked should also have been given. In ascertaining the difference in value of the goods, the time and place of the sale and warranty are to be considered, because the plaintiff is entitled to recover that amount which would make the article purchased such as it was represented to be at that time and place, and not at any subsequent time.—*Shepherd v. Hampton*, 3 Wheat. 200; *Furlong v. Polleys*, 30 Maine R. 492; *Wells v. Abernathy*, 5 Conn. 227; *Shaw v. Nudd*, 8 Pick. 13; *Loder v. Allen*, 2 Bibb, 338; *Hanna v. Harter*, 2 Arkansas R. 397; *Davis v. Adams*, 18 Ala. 265; *Ivey v. McQueen*, 17 *ib.* 408; *Sedgwick on Damages*, 280, 295; *Comstock v. Hutchinson*, 10 Barb. (S. C.) R. 213. The sale of the cotton in New Orleans, several months subsequent to the sale by defendant to plaintiff, cannot throw any light upon, or tend in any way to show, its value in Montgomery at the time of the sale and warranty. If the plaintiff could keep the cotton for four months, and then sell it for the purpose of ascertaining its value, he might keep it for twelve months, or even longer. Such evidence is too remote and uncertain, particularly to ascertain the value of an article as subject to fluctuation in price as cotton. The effect of the second and third charges asked was, to ask the court to exclude this evidence from the jury.

HILLIARD & THORINGTON, with whom was JAS. E. BELSER, *contra*:

1. The first charge asked was properly refused, for several reasons. In the first place, it does not accurately lay down the rule for the measure of damages for a breach of warranty in the sale of any kind of chattel. If given without explanation or qualification, it would not have permitted the jury to give interest on the difference in value from the day of sale to the trial; and for this reason it was properly refused. *Swallow v. The State*, 22 Ala. 20; *Ross v. Ross*, 20 *ib.* 105. Secondly, the general rule of law, which is in part stated in the charge, has no application to this case, because bales of cotton bought in Montgomery, or in any other inland town, are not to be put on the same ground with horses or negroes. The courts judicially take notice of the general customs and usages of merchants, and of the general course of trade. They will presume, therefore, that bales of cotton, bought in an inland town, are bought for shipment and sale elsewhere. As the cotton in question was actually shipped for sale at New Orleans, the measure of damages is entirely different from that hinted at, but not fully stated, in the first charge. Thirdly, in addition to the mere difference between the sound and damaged cotton, the plaintiff was entitled to recover the expenses of shipping it, or of having it examined in New Orleans, or of having it sold there.

2. As to the second and third charges, see *Reese v. Beck*, 24 Ala. 651; *Ward v. Winston*, 20 *ib.* 167. In proving the value of anything, the law allows a wide range. Opinions are admitted on such matters. The opinions of experts, as to the value of the damaged cotton in New Orleans, is evidence, however weak, which may be considered in determining its value in Montgomery.—*Dixon v. Barclay*, 22 Ala. 370. And the price at which it sold there, at public auction, after notice, is admissible for the same purpose.

GOLDTHWAITE, J.—There is no doubt that, on a warranty of quality, or soundness, the purchaser is generally entitled to recover the difference between the actual value of the article at the time of the sale, and the value which the article would have been worth at that time had it come up to



the warranty.—Kornegay v. White, 10 Ala. 255; Marshall v. Wood, 16 Ala. 806. But in such cases, this amount is the minimum of damages; he is entitled to this, and he may rightfully recover more. The object of the action is, to compensate the plaintiff for the injury he has sustained; and in each of the cases cited it was held, that when the rule to which we have referred applied, the jury might allow interest, and that instructions to this effect were proper. It follows necessarily from these decisions, that if the jury were legally authorized to give more than the amount which the instructions requested asserted was the measure of damages, the instructions were properly refused.

If we concede the rule insisted upon by the appellant, that the difference of value between the article sold and the article as warranted at time and place of sale is the criterion of the damages, we see no error in the refusal of the court to give the other charges requested. The evidence is, that the cotton was sold by samples on the 9th January, 1851, and it was warranted to come up to the samples. The price that it sold for in Orleans on the 5th of May, at public auction, after notice to the appellant, was certainly a circumstance tending to establish its value at that time and place; and as there was evidence of the value of the sample cotton at the same time and place, the proportion of value between the two cottons at Orleans is established. The evidence shows, also, that the relative value of the two cottons was the same in Montgomery as in Orleans, and it further shows the value of the sample cotton at the former place on the 9th January, 1851; and this being established affords the means of ascertaining the value of the other at that time and place. It was therefore proper for the jury to look to the price the cotton sold at in Orleans on the 5th May, 1851, in connection with the other evidence, in order to determine its value on the day of sale in Montgomery.

Judgment affirmed.

## OWEN vs. JORDAN.

[PROCEEDINGS IN PROBATE COURT FOR ELEVATION OF MILL-DAM.]

1. *In summary proceedings, record must affirmatively show compliance with statute.*—Where a special and limited jurisdiction is conferred by statute, upon either an individual or a court, the record must affirmatively show a compliance with all the requisitions of the statute.
2. *Inquest of jury, on writ of ad quod damnum, held insufficient.*—The writ of *ad quod damnum* in this case was issued on an application to the probate court for the elevation of a mill-dam already erected (Code, §§ 2089-98); and the inquest of the jury was quashed, because, 1st, the return did not show that the jury were sworn by the sheriff “to discharge their duties fairly and to the best of their ability”; 2dly, it did not show that they were charged by the sheriff as the statute directs; and, 3dly, it did not respond to the matters which the statute requires them to investigate.

## APPEAL from the Court of Probate of Lowndes.

ROBERT F. OWEN, the appellant, filed his petition in the Probate Court of Lowndes, alleging that he was the owner of certain lands in said county, through which Blue creek flowed; that said creek was not a navigable stream; that a mill had been erected on said creek, and a dam constructed across it over seven feet high, but the water did not rise more than seven feet before it flowed off through a “waste-way” erected for that purpose; that he was the owner in fee simple of the land on both sides of said creek opposite said mill and dam, and was desirous of raising the dam to the height of eight feet, for the purpose of accumulating water power sufficient to run a saw and grist mill; and he prayed that a writ of *ad quod damnum* might be issued, directing the sheriff of the county to summon seven disinterested freeholders, to make inquiry concerning the matters required by law in the premises.

On the filing of this petition, a writ of *ad quod damnum* was issued to the sheriff, who returned it executed, within the time prescribed by law, by summoning seven persons as jurors; but his return nowhere shows that these persons were freeholders of the county. At the same time, the jury returned their inquest, which was as follows:

"We, the jury, sworn to investigate the matter in relation to Robert F. Owen's mill, after thorough examination, return the following verdict: We believe that the mill of Robert F. Owen, as it now stands, is of benefit to the neighborhood, and does not do any one any harm; but to raise the water any higher, it would injure the land of Wm. H. Jordan, but how much we are not able to say; and that it might cause sickness, and, in our judgment, the water ought not to be raised any higher."

(Signed by all the jurors.)

Wm. H. Jordan, who appeared in court at the time the return of the jury was made, and who averred that he was personally interested in the matter, was allowed to make himself a party to the proceeding, and to contest the application of the petitioner. On the day appointed for the hearing of the case, a motion was made by counsel, as *amicus curiæ*, to quash the inquest on the following grounds:—

"1. Because the verdict does not show that the jury examined the lands above and below, belonging to others, which may probably be overflowed or injured, and ascertained and assessed the damages resulting from the erection and continuance of said dam to the several owners of such land; and does not show who are the owners of the lands adjoining the mill of said Owen, nor whether the said owners, or any of them, are minors, lunatics, married women, or non-residents.

"2. Because it does not show that the jury examined the land above and below said mill, to ascertain whether the residence of such owner or owners, or outhouses, enclosures, gardens, or orchards thereunto immediately belonging, will be overflowed.

"3. Because it does not show whether the health of the neighborhood would probably be injured by the continuance of said dam.

"4. Because it does not show that they have examined to ascertain whether any other mill or water-works will be overflowed by the erection or continuance of said dam.

"5. Because the said jury returned in their said verdict that the mill of said Owen, as it now stands, is a benefit to the neighborhood,—a matter about which they were not charged to inquire, and into which they had no right to inquire.

"6. Because the verdict does not show that the jury were charged by the sheriff at all, nor that they were charged as the law directs.

"7. Because the verdict is so uncertain, insufficient, and indefinite, that the court can render no judgment thereon."

The court overruled this motion, but permitted Jordan to introduce evidence showing that the application of the petitioner should not be granted; and decided, on the evidence thus adduced, "that the inquisition of the jury, under the proof, is too indefinite to warrant a decree, in that it does not show what was the height of the water, and in the petition it is incorrectly set forth." The court then rendered judgment, quashing the verdict of the jury, ordering a *venire de novo* if Owen desired it, and adjudging the costs (\$220 40) against Owen; from which judgment he now appeals, and here assigns the same for error, together with other matters shown in the bill of exceptions.

WATTS, JUDGE & JACKSON, for the appellant, contended,—

1. That it will be presumed, in the absence of evidence to the contrary, that the sheriff did his duty, and that the jury were charged as the law directs. The statute does not require anything to be done by the applicant, after filing his petition, except to pay such damages as may be assessed. The sheriff's default, or omission of duty, will not be allowed to defeat or affect the applicant's rights.—Hendricks v. Johnson, 6 Port. 472.

2. The verdict of the jury shows that they were sworn as the law directs, and is in all respects a substantial compliance with the requisitions of the statute.—Wroe v. Harris, 2 Wash. (Va.) R. 126. The cases cited by the appellee's counsel are believed to have been decided under statutes different from ours.

J. F. CLEMENTS, *contra*, cited the following cases:—

1. To show that the requisitions of the statute must affirmatively appear to have been complied with,—Commissioners' Court of Talladega v. Thompson, 18 Ala. 694; same case, 15 *ib.* 134; Molett v. Keenan, 22 *ib.* 484; Lyon v. Hunt, 11 *ib.* 310; Pope v. Headen, 5 *ib.* 433; Cresswell & Monette v. Commissioners' Court of Greene, 24 *ib.* 282.



2. To show the insufficiency of the inquest,—Code, § 2098; Bibb v. Mountjoy, 2 Bibb, 1; Shackelford's Heirs v. Coffey, 4 J. J. Mar. 40; Trabue v. Macklin, 4 B. Mon. 407; Rout v. Mountjoy, 3 *ib.* 300; Eppes v. Cralle, 1 Manf. 258; Hunter v. Coalter, 4 Rand. (Va.) R. 58; Whitworth v. Puckett, 2 Gratt. 528.

CHILTON, C. J.—In proceedings of this character, where a special and limited jurisdiction is conferred, either upon an individual, or upon a court, it must affirmatively appear that the requisitions of the statute have been complied with. A number of decisions, recently made by this court, and which are too familiar to require citation, fully establish this proposition.

In this case, the court very properly quashed the return made by the sheriff of the finding of the jury, because it was defective,—1st, in not showing that the jury were sworn by the sheriff, or his deputy, "to discharge their duties fairly and to the best of their ability,"—as required by the Code (§ 2098); 2d, in failing to show that the jury were charged by the sheriff, or his deputy, as required by the several clauses of the section of the Code above referred to; and, 3d, because the verdict or inquest does not respond to these matters so required to be given them in charge, and which they were summoned to ascertain, but ascertains merely, 1st, that the mill as it now stands is a benefit to the neighborhood; 2d, that it harms no one; 3d, that to raise the dam any higher it would injure W. H. Jordan, but they cannot undertake to say how much; 4th, that it might cause sickness; and, 5th, that in their judgment the water ought not to be raised any higher.

This is not the finding required by the statute, which provides,—1st, that they shall examine the land above and below, which may probably be overflowed or injured, and ascertain and assess the damages resulting from the erection of such dam, to the several owners of such lands; 2d, if the residences of such owner, or the outhouses, enclosures, gardens, or orchards, thereunto immediately belonging, will be overflowed; 3d, if the health of the neighborhood will probably be endangered; and, 4th, if any other mill or water-works will be overflowed.—Code, § 2098.

These are the several matters about which they are to be charged to inquire, and their inquest of which is required to be written down and signed by them, or a majority of them, and delivered to the sheriff, who is to return it to the probate judge.—Code, § 2100.

It is too clear, we think, to admit of serious doubt, that the inquest is wholly insufficient. It does not substantially conform to the law.—*Burden v. Stein*, 25 Ala. 455.

Let the judgment be affirmed.

## POWELL'S ADM'R vs. HENRY.

[ACTION ON JUDGMENT—QUESTIONS OF AGENCY.]

1. *Extent of agent's authority, and liability of principal for his unauthorized act.*—The delivery of an account to an agent, for the purpose of collecting it, confers no authority to settle it in any other mode; and if the agent exceeds his authority, although the principal may ratify the act, yet, to avoid it, he is not obliged to give notice that he repudiates it.
2. *Collateral security does not extinguish original debt.*—If an agent to collect takes a note as collateral security, no inference of payment can properly be drawn from the recognition of the act by his principal.
3. Every one who deals with an agent is bound, at his peril, to ascertain the extent of his authority.
4. *Liability of creditor for note taken as collateral security.*—If a creditor takes a note on a third person as collateral security for his debt, he is bound to the use of due diligence in its collection, and is responsible to his debtor for any damages caused by his laches; but if the note is on an insolvent person, its retention for never so long a period will not authorize the inference of payment of the original debt.

APPEAL from the Circuit Court of Baldwin.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by George G. Henry against the administrator of William T. Powell, deceased, in October, 1853, to recover the amount of a judgment rendered in said court on the 13th April, 1840, in favor of the plaintiff and

against said Powell, for \$483 61, together with the costs of suit and interest. The defendant pleaded "the general issue," and payment.

On the trial, after the plaintiff had introduced the record of his judgment, the defendant read in evidence the deposition of one William H. Lee, and the plaintiff's answers to interrogatories propounded to him under the statute; the substance of which evidence may be thus stated: The plaintiff was a merchant in Mobile in 1840, and Lee was employed by him as a clerk in his store from about December, 1840, to June, 1841; being then a mere lad, and just commencing to learn business. Learning that a Mrs. Tate was claiming Powell's property, and was paying off his debts, plaintiff sent Lee to her to demand payment of his judgment, with instructions to take a draft on her commission merchant, if he could not get the money; but Lee, through want of experience in business, took from her, as collateral security, a note on one D. N. Harris, for \$400, payable to himself, and gave her a receipt for the debt, except as to a small balance due. Lee states that he had no authority to take the note, that he only took it as collateral security, and that his employer was much displeased with him on account of it. The plaintiff states that, on making inquiry at the time, he learned that Harris was insolvent, and therefore regarded the note as worthless; that he notified Powell of this, and afterwards had execution issued on his judgment; that he afterwards obtained another note from Harris, of the same date, amount, and falling due at the same time, intending to return it to Mrs. Tate in place of the note which Lee had taken from her, but he neglected to do this, and still has the note in his possession. After the defendant had read this evidence to the jury, the plaintiff introduced a witness, who testified to facts conducing to show that Harris was insolvent from 1840 to 1853; but the witness stated, also, that he could not say from his own knowledge that Harris was insolvent, nor did he know of any debts outstanding against him.

On this evidence, the court charged the jury as follows:—

"1. That if Lee, the agent of Henry, exceeded his authority in making the settlement, Henry was not bound by it, unless he had subsequently recognized it.

"2. That though the receipt, of itself, was *prima facie* evidence of payment, it might be explained; and if the note of Harris was in fact taken as collateral security only, and not as payment, and the jury believed that the note was worthless, then Henry was not bound to sue on it."

The defendant did not except to these charges, but requested the court to give the following:—

"1. That Lee, being the agent of Henry, and in possession of the account, was authorized to make the settlement, unless repudiated by Henry; and his refusal to be bound by the settlement should have been made known, within a reasonable time, either to Mrs. Tate or to Powell.

"2. That Henry giving no notice to Mrs. Tate or Powell of his refusal to recognize the act of Lee in the settlement, Mrs. Tate or Powell had a right to presume that it was satisfactory, and that the debt was paid.

"3. That Lee's acts were binding on Henry, to the extent of the settlement, unless the extent of his authority was made known either to Mrs. Tate or Powell.

"4. That the retention of the note by Henry, from April, 1840, until 1853, without a rescission of the settlement,—returning the note, and notifying Mrs. Tate or Powell of the fact,—might be regarded as a payment of the debt."

The court refused these charges, and the defendant excepted to each refusal; and he now assigns these matters for error.

F. S. BLOUNT and A. R. MANNING, for the appellant.

E. S. DARGAN, *contra*.

GOLDTHWAITE, J.—The first charge requested on the part of the appellant was properly refused. The rule is, that an unauthorized act of the agent may be ratified by the principal, and the jury were so instructed; but the language of the charge as asked goes beyond this, and either asserts that the mere delivery of an account to an agent, for the purpose of settling it one way, confers authority to settle it in any other mode, or that the principal is bound, unless he repudiates the acts of the agent done without authority. In either aspect, the proposition is not to be maintained.

The second charge was objectionable, for the reason, that



if the agent took the note as collateral security, of which there is some evidence, it did not extinguish the original claim; and in that aspect, no inference as to its payment could properly be drawn from the recognition of the act by the principal.

The third charge asked is in direct opposition to the law of agency, which requires every one dealing with an agent to ascertain the extent of his authority. It is true that the power of an agent to bind his principal will frequently be implied from the nature and extent of the employment of the former; but no case has gone so far, as to hold that the mere circumstance of a person being employed as a clerk in a store authorizes him to compound the debts due to his employer. If there was any evidence that such authority had been usually exercised by him, and that it was known to the person making the settlement, the case might have been different; but there was no such testimony.

Neither was there any error in the refusal to give the fourth charge. There was evidence, tending to show that the maker of the note taken by Lee was insolvent; and if such was the case, and it was taken as collateral security, the retention of it, for never so long a period, would not warrant the inference of the payment of the original debt. The party who receives a note as collateral security, is bound to the use of due diligence; and if, by his laches in this respect, the original debtor sustains damage, it is a good defence, *pro tanto*, to a suit against him on the original claim.—*Russell v. Hester*, 10 Ala. 535. But it is only the actual damage that in such case is recoverable, as no one but the parties to a bill or note can complain of laches, unless he can prove it has done him prejudice, and can only recover to the extent of such prejudice.—*Story on Bills of Exchange*, § 305, note 4.

Judgment affirmed.

## CAREY vs. McDOUGALD'S ADM'R.

[MOTION TO QUASH FI. FA. FOR COSTS OF APPEAL.]

1. *Costs allowable if certificate prima facie show jurisdiction.*—Where the certificate of the clerk, appended to the transcript, *prima facie* gives the appellate court jurisdiction of the case, costs are allowable, although the case is finally stricken from the docket for want of jurisdiction.

## APPEAL from the Court of Probate of Russell.

THE transcript in this case was brought up to the June term, 1853, and a decision was here rendered at June term, 1854, which may be found in 25 Ala. 109. The facts shown by the transcript, minute entries, judgment, and dockets of this court, so far as they have any bearing on the present motion, are as follows: In his final certificate, appended to the transcript, the judge of probate certifies, "that an appeal was taken on the 12th day of February, 1853, by the plaintiff in said cause, to the Supreme Court of Alabama, from the decision of this court; and that Allen Eiland is the security of said plaintiff for the costs which may accrue against said appellant in the Supreme Court." The transcript was marked "Filed, July 25, 1853", by the then clerk of this court, and the case was entered on the trial docket at that term. At the January term, 1854, the appellant's attorneys entered their appearance, and on their motion a *scire facias* to hear errors was awarded; which was issued, and returned executed. At the June term, 1854, on motion of the appellee, a special *certiorari* was awarded to the primary court, requiring the judge of probate to certify to this court the day on which the security for the costs of the appeal was given. This writ was duly issued, and the return to it showed that the security was given more than thirty days after the decision of the court from which the appeal was prosecuted; and the writ, with its return, was filed among the papers of the cause. At the January term, 1855, the cause was here stricken from the docket for want of jurisdiction, and a judgment for costs rendered against the appellant and his surety. On this judg-

ment a *fi. fa.* for the costs issued, which the surety now moves to quash, on the ground that the court had no jurisdiction to render a judgment for costs.

JAMES B. MARTIN, for the motion, contended, that no judgment for costs could be rendered, unless the court had jurisdiction ; and cited *Mazange v. Slocum & Henderson*, 23 Ala. 668.

JAMES E. BELSER, for the plaintiff in the execution, and J. W. SHEPHERD, for the clerk of the court, *contra* :

1. Costs are entirely dependent upon statutory regulation, and the statutes of this State make no exceptions of cases which are not within the jurisdiction of the court. When a bill in chancery is dismissed for want of jurisdiction, or a plea to the jurisdiction sustained in a common-law case, judgment for costs is always awarded ; and no reason is perceived for a distinction, in this particular, between courts of original and appellate jurisdiction.—Clay's Digest, p. 316, § 20 ; Code, § 2375 ; *Westmoreland v. Hale*, 11 Ala. 122 ; *Winchester v. Jackson*, 3 Cranch, 515 ; *Briscoe v. Briscoe*, 3 A. K. Mar. 499.

2. The practice of striking causes from the docket for want of jurisdiction, is equally oppressive to the parties litigant and the clerks of the courts ; and it is obnoxious to the greater objection, that it makes the clerk of this court, *pro hac vice*, a judicial officer, in submitting to his decision a jurisdictional fact,—often the most important question in the cause. That the clerk of the primary court cannot demand his fees when the transcript is delivered, but must await the final determination of the cause in the appellate court, see *McRae v. Juzan*, 4 Ala. 286 ; *McCord v. Boyd*, 12 *ib.* 760.

PER CURIAM.—The motion must be overruled. The certificate of the probate judge in this case, *prima facie*, gave jurisdiction ; and there was, therefore, a warrant for putting it on the docket, which distinguishes it from *Mazange v. Slocum & Henderson*, 23 Ala. 668. Being properly on the docket, the question of rightful jurisdiction was a matter which was tried ; and the costs should follow the judgment.

## MONTGOMERY AND WETUMPKA PLANK-ROAD COMPANY *vs.* WEBB.

[TRIAL OF THE RIGHT OF PROPERTY IN CERTAIN PERSONAL CHATTELS.]

1. *Stockholder in private corporation not competent witness for it.*—The members or stockholders in a corporation, created for private emolument, are not competent witnesses for the company; and where the charter provides that the directors "shall be owners of stock", proof that the witness is a director, unexplained and uncontradicted by other evidence, is sufficient to exclude him.
2. *When interested witness may prove his own competency.*—If the interest of a witness appears from his own testimony, he may testify to facts which will remove the objection; *aliter*, when his interest is otherwise shown.
3. *Construction of admission on application for continuance.*—Where an application is made for a continuance on account of the absence of a material witness, and the adverse party admits that the witness, if present in court, would swear to the facts stated in the affidavit, this is neither an admission that the facts stated are true, nor that the witness is competent to testify.
4. *Presumption that continuous fact, once proved, still exists.*—Where a witness is shown to have been a stockholder in an incorporated company three years before the trial, it will be presumed that he continued to be a stockholder at the time of the trial.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. NAT. COOK.

THIS was a trial of the right of property in several yokes of oxen, a large quantity of lumber, and other articles of personal property, on which an attachment had been levied at the suit of Fortunatus S. Webb against Church & Skinner, and a claim interposed under the statute by the appellant. When the cause came on for trial, and after the plaintiff had announced himself ready, the claimant applied for a continuance on account of the absence of a material witness, and in support of the application submitted the affidavit of L. B. Moody, who swore "that Joseph S. Winter is a material witness for the claimant, has no interest in the result of this case, has been subpœnaed and does not attend, and is not absent by the procurement or consent of claimant"; and then stated the material facts which said witness, if present, would prove.



"The plaintiff admitted, that said witness, if he was in court, would swear to the facts set forth in said affidavit. Plaintiff also proved, that said witness, in the spring of the year 1850, was a member of the board of directors of said company. Plaintiff objected to the claimant's reading said affidavit to the jury as evidence, because of the interest of said witness in the result of this suit; which objection the court sustained, and ruled out said testimony." The claimant excepted to this ruling of the court, and now assigns it for error.

NAT. HARRIS, for the appellant, contended,—

1. That the admission made by the plaintiff below, under the 16th rule of practice (Code, p. 715), was an admission that the facts stated in the affidavit were absolutely true. The language of the rule ("If the adverse party will admit *what*, it is so alleged, such absent witness will swear," &c.) admits of no other construction; and it was obviously intended that the party applying for a continuance should have the benefit of the facts which he desired to prove,—a benefit of which he would be entirely deprived, if he could be forced into a trial, while his adversary had the right to prove that the facts stated in the affidavit were not true, or that his witness was not worthy of credit.

2. One of the facts stated in the affidavit was, that Winter, if present in court, would swear that he had no interest in the result of the suit. If the witness had personally sworn to this fact, his testimony could not have been excluded.—*Dent v. Portwood*, 17 Ala. 245.

3. The evidence was not sufficient to raise a presumption that the witness was interested.—*Cleland v. Huie*, 18 Ala. 346.

ELMORE & YANCEY, *contra*, insisted, 1st, that as the evidence showed that Winter was a director (and therefore a stockholder) in the spring of 1850, the presumption was that he was a stockholder at the time of the trial; and, 2dly, that a stockholder is not a competent witness for a private corporation. They cited, to the first point, 1 Greenl. Ev. § 41; and to the second, *ib.* § 333.

RICE, J.—The members, or stockholders, in a corporation

created for private emolument, are not admissible as witnesses for the corporation.—1 Greenl. Ev. § 333.

The 5th section of the charter of appellant provides, that the directors "shall be owners of stock."—Pamph. Acts of 1849-50, p. 244, § 5. The proof, then, that Joseph S. Winter was a director of appellant in the spring of 1850, unexplained and uncontradicted by any other evidence, was proof that he was a stockholder.

If this proof had been made by the testimony of Joseph S. Winter himself, then the other part of his testimony, showing that at the trial, in the spring of 1853, he had no interest in the result of this case, should have been considered by the court, and held sufficient to admit him as a witness. But, as the proof of his interest was made in another way, and came from a competent source, it is clear that he could not by his own testimony remove the objection to him as an interested witness, nor qualify himself to testify for the appellant.—*Herndon v. Givens*, 19 Ala. 313.

The plaintiff admitted only, that if Joseph S. Winter was in court, *he would swear* to the facts as set forth in the affidavit of Moody. This was neither an admission that the facts as therein set forth were true, nor that Joseph S. Winter was a competent witness to testify either to the court or the jury.

There was competent evidence, showing that Joseph S. Winter was a director and stockholder, and therefore interested. There was no competent evidence to the contrary, unless the lapse of time between the spring of 1850 and the spring of 1853 furnished ground for presuming that he had ceased to be a stockholder. This lapse of time did not furnish ground for any such presumption. On the contrary, as he was proved to be a stockholder in the spring of 1850, the presumption is that he continued to be a stockholder at the trial in the spring of 1853.—1 Greenl. Ev. §§ 41, 42; *Garner v. Elliott*, 8 Ala. 96.

Judgment affirmed.

LAMPLEY ET AL. *vs.* WEED & CO.

[BILL IN EQUITY BY JUDGMENT CREDITOR TO REDEEM LANDS SOLD UNDER MORTGAGE.]

1. *Objection to agent's authority to make tender.*—The defendant in a redemption suit cannot raise the objection in his answer, that the agent, by whom the tender was made, was not authorized to make it, unless he objected to the tender on that ground when it was made.
2. *Hearing on bill and answer.*—Although the answer is to be taken as true in every respect, when the cause is submitted by consent on bill and answer only; yet, where the answer admits enough to sustain a decree for complainant, his bill should not be dismissed.

APPEAL from the Chancery Court of Barbour.

Heard before the Hon. WADE KEYES.

THIS bill was filed by Wm. H. Weed & Co., as judgment creditors of James E. Warren, to redeem certain lots in the town of Clayton, which had been sold under mortgage executed by said Warren, and purchased by John M. Lampley, who was the mortgagee. The bill alleged a tender and refusal of the amount of the purchase money, with ten per cent. interest thereon and all lawful charges, and the further offer to credit complainants' judgment with a sum at least equal to ten per cent. of the purchase money; and the tender was renewed in the bill. The defendant answered the bill, admitting the rendition of complainants' judgment, the issue and return of execution thereon, the execution of the mortgage, the sale under it, and his own purchase. In reference to the alleged tender, he states that one "Henry D. Clayton, in March, 1853, stated to respondent that he was authorized by James L. Pugh, esq., to redeem said lots under a judgment in favor of Weed & Co. against said Warren, and that he wished to redeem it accordingly, and would pay respondent his purchase money, with ten per cent. thereon; that respondent did not then know or admit that said Clayton had any authority to redeem said lots under said judgment, nor does he now know or admit any such authority; that respondent did not consider or admit said offer to be a compliance with the

statute, nor does he now admit it, but, on the contrary, avers that it is not a compliance with the statute, and that complainants have no right to redeem said lot; that within a week afterwards said Clayton returned, and said he was then prepared to pay respondent the balance due on said mortgage, which was some thirty or forty dollars, and the said purchase money, with ten per cent. thereon, for the purpose of redeeming said lot under the statute; that respondent did not then, nor does he now, know, admit, or recognize any authority in said Clayton to make either or any of said offers to redeem, either for himself or any other person; that said offer was not a compliance with the statute, and respondent then insisted, as he still insists, on his right to retain and keep said lot; that complainants never made any offer to redeem said lots", &c.

The case was submitted for final decree, on bill and answer; and the chancellor held, that the complainant was entitled to the relief prayed. A reference to the master was ordered of the matters of account, and his report was confirmed without exception. The chancellor's decree is now assigned for error.

JAS. E. BELSER, for the appellant, contended,—

1. That as the cause was heard on bill and answer only, the allegations of the answer must be taken as true.—*Forrest and Wife v. Robinson*, 2 Ala. 215; *White v. Florence Bridge Co.*, 4 *ib.* 464; *Edmondson v. Montague*, 14 *ib.* 370.

2. That the tender made by Clayton was not sufficient, because Pugh, even if authorized to make a tender as agent for complainant, could not appoint another agent to act for him. *Story on Agency*, §§ 13, 14; *Bryant v. Owen*, 1 Port. 201; *Wood v. Milam*, 7 Ala. 800.

3. That Clayton's agency should have been proved, since the answer disclaimed all knowledge of it.—*Strawbridge v. Spann*, 8 Ala. 826; *O'Connell v. Walker*, 1 Port. 263; *Scott v. Crane*, 1 Conn. 255.

CHILTON, C. J.—Although Lampley raises a weak objection to Clayton's authority to make the offer of redemption, he does not aver that he was not authorized, or that he raised any objection to a redemption on the ground of a want of



authority. Had he done so, the supposed defect of want of authority, doubtless, might readily have been supplied. But he refused to allow the redemption, and insisted upon his right then, as he still does by his answer, to hold on to the land. He cannot now be allowed to set up the want of authority in Clayton, having made no such objection then; the complainants insisting upon the acts of Clayton as binding upon them, as their authorized agent. The case of Couthway v. Berghaus, 25 Ala. 393, is directly to this point, and shows that the offer was sufficient.

The objection, that the bill should have been dismissed, because, the case having been submitted by consent on bill and answer only, the answer must be regarded as true in every respect,—would be available, but for the fact that the answer admits enough to sustain the decree.

As to the amount due upon Lampley's mortgage, the answer is somewhat indefinite,—stating that it was thirty or forty dollars. The register reports the amount, with interest, at forty-five dollars. We see nothing improper in this. If the item was improper, exceptions should have been taken to the report; but this was not done.

Let the decree be affirmed.

RICE, J., having been of counsel in this case, did not sit.

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### PICKLE'S ADM'R *vs.* EZZELL.

[APPEAL FROM ALLOWANCE OF CLAIM AGAINST INSOLVENT ESTATE.]

1. *Insufficiency of affidavit.*—When a claim against an insolvent estate is verified by the affidavit (not of the creditor, but) of a third person, who swears that the claim, “to the best of his knowledge, information, and belief, is yet due and unpaid”, but does not state that he has any knowledge of its correctness or that it is due,—the affidavit is not sufficient, and the claim should be rejected.—Code, § 1847.

APPEAL from the Court of Probate of Henry.

IN THE MATTER of the estate of Amos Pickle, deceased, which was reported and declared insolvent on the 21st March, 1853. The appellee, as surviving partner of the firm of Radford & Ezzell, filed certain claims against said estate, which were verified by the affidavit of John W. Harper, who stated that said claims, "to the best of affiant's knowledge, information, and belief, are yet due and unpaid." The administrator objected to the allowance of the claims, on account of the insufficiency of the affidavit; and raised several other objections to them, which it is unnecessary to notice. The court decided that the affidavit was sufficient, and its ruling is now assigned for error.

E. C. BULLOCK, for the appellant.

JAMES L. PUGH, *contra*.

GOLDTHWAITE, J.—The Code (§ 1847) requires all claims against insolvent estates to be verified by the oath of the claimant, or of some other person, "who knows the correctness of the claim, and that the same is due"; and the affidavit in this case cannot be regarded as a fulfillment of this requisition, since it does not show that the party had any knowledge either as to the correctness of the claim, or that it was then due. If no objection had been made to it, the court should not have allowed the claim (Code, § 1853); and, *a fortiori*, when the objection was made on the specific ground, it should have been sustained.

Judgment reversed, and cause remanded.

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LOVE vs. CROOK ET AL.

[BILL IN EQUITY FOR SPECIFIC RECOVERY OF SLAVES.]

1. *Executory contract of sale construed*.—Articles of agreement, bipartite, whereby the party of the first part "doth hereby agree to bargain, sell, and convey," unto the party of the second part, certain slaves, in consideration that the party

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of the second part "*hereby delivers to the said*" party of the first part, "*by order, all his right, title, and interest, both in law and equity, to the sum of \$2,000*", part of an amount just recovered from the United States by an agent of the party of the second part; and conditioned, that if the said party of the second part "*will, by any means, with or without suit, either in law or equity, enable the said*" party of the first part "*to recover said sum of \$2,000, with lawful interest,*" from said agent, then the said party of the first part "*binds himself, his heirs, executors, &c., that the above bill of sale shall be absolute, and shall convey unto him, his heirs, executors, &c., all right, title, and interest in said slaves; otherwise, to be void and of no effect,*"—held neither a mortgage, nor an absolute sale, but an agreement to sell, which did not, *per se*, pass the legal title to the slaves.

2. *Equity jurisdiction, where remedy at law is plain, adequate, and complete.*—If the owner of slaves allows them to go into the possession of an intended purchaser, under an executory contract of sale, which does not pass the legal title, he may recover them by action of detinue; but whether he proceeds for the slaves themselves, or for their agreed price, his remedy is at law, and he cannot come into equity.

APPEAL from the Chancery Court of Benton.

Heard before the Hon. JAMES B. CLARK.

THIS suit was founded on the following contract:—

"Articles of agreement, made and entered into this 18th of March, 1844, between Thomas Raper, of the county of Cherokee and State of North Carolina, of the one part, and J. R. Love, of the county of Hayward and State of North Carolina, of the other part, *witnesseth*, That, for the consideration hereinafter mentioned, the said James R. Love doth hereby agree to bargain, sell, and convey unto the said Thomas Raper three negro slaves, named Perry, aged about twenty-five years old, Mary, his wife, aged about twenty-two years old, and Harrison, a boy, aged about three years old; all of which negroes the said James R. Love will warrant to be (*sound?*) and slaves for life. The consideration is as follows: The said Thomas Raper hereby delivers to the said James R. Love, by order, all his right, title, and interest, both in law and equity, to the sum of two thousand dollars; being part of an amount of money recovered by Wm. H. Thomas, as agent for the said Thomas Raper, from the United States Government, on certain claims which the said Thomas Raper held upon the said Government under the Cherokee treaty of one thousand eight hundred and seventeen and nineteen, and one thousand eight hundred and thirty-five and

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thirty-six ; as by the record of the commissioners for the adjudication of the Cherokee claims, when sitting in the State of Tennessee, and on file in some of the departments of the United States Government, will more fully appear. Now, if the said Thomas Raper will, by any means, with or without suit, either in law or equity, enable the said James R. Love to recover from the above-named Wm. H. Thomas the above-named sum of two thousand dollars, with lawful interest from this date, then the said J. R. Love binds himself, his heirs, executors, &c., that the above bill of sale shall be absolute, and shall convey unto the said Thomas Raper, his heirs, executors, &c., all right, title, and interest in the above-named slaves, Perry, Mary, and *Thomas* (?) ; otherwise, to be void (and) of no effect.

“Signed, sealed, and delivered in presence of us, the attesting witnesses, the day and date above written.

Attest : Wm. Welch, {	J. R. LOVE; [Seal.]
B. Turner. }	THOS. RAPER, [Seal.]”

The bill was filed by James R. Love, the appellant, and alleged the execution of the contract above set out, on the day of its date, in North Carolina ; that it was expressly understood between the parties, at the time the contract was made, that the sale of the slaves was not absolute, until and unless said sum of money was paid, and that no title to said slaves was thereby given or to enure to the said Raper, until and unless said money was paid ; that complainant, confiding in Raper's good faith, and believing that the money would be paid by said Thomas, suffered Raper to take said slaves into his possession ; that said Thomas was then in Washington city, and complainant forwarded said order to him at that place ; that said order was presented to Thomas for payment on the 29th April, 1844, and payment was refused by him ; that complainant, immediately afterwards, notified Raper of the non-payment of said order, but he failed and refused to enable complainant to recover the same of Thomas ; that complainant was induced by the statements and representations of Thomas to await his return from Washington, when he was assured that all things would be satisfactorily adjusted ; that Thomas did not return from Washington until after the expiration of three or four years, and he then averred



that he did not owe Raper anything, and that he had paid him all that was owing to him ; that complainant thereupon filed a bill in equity against said Raper and Thomas, in the Circuit Court of Hayward county, North Carolina, which suit is still pending.

The bill further alleges, that said Raper, so soon as said bill was filed, pretended to sell said negroes to James H. Bryson and Jesse B. Brooks, both of said Cherokee county, North Carolina, who immediately ran them off by stealth to Benton county, Alabama, and there sold them to John M. Crook, in whose possession they now are ; that said Raper and Bryson are insolvent, and the condition of Brooks is unknown to complainant ; that said slaves were thus disposed of by them with the fraudulent intention of depriving complainant of his just rights, and of converting said slaves to their own use ; and complainant charges, from the inadequacy of price paid by said Crook, that he must have been cognizant of this fraud and the consequent defect of title to said slaves.

The prayer of the bill is for a temporary injunction, to prevent the removal of the slaves out of the jurisdiction of the court,—that, on final hearing, they may be set over and delivered to complainant ; and the general prayer for other and further relief is added.

The cause was submitted to Chancellor Walker, on motion to dismiss the bill for want of equity ; which motion he sustained, but granted the complainant leave to amend his bill. The grounds of the decree were, that the contract shown by the writing, in connection with the allegations of the bill, was not a mortgage, but a sale upon condition ; and that complainant's remedy, therefore, was at law. In support of this position, the chancellor cited the following cases : *Mount v. Harris*, 1 Sm. & Mar. 194; *Barrett v. Pritchard*, 2 Pick. 512; *4 Mason*, 283; *Story on Sales*, § 400; *Sewall v. Henry*, 9 Ala. 85. He further held, that allegations might be added to the bill, which would justify the inference that the contract was intended as a mortgage. At the next term of the court, the complainant presented a proposed amendment of his bill in another particular ; but Chancellor Clarke held, that the proposed amendment was immaterial, and that the bill would

still contain no equity ; and as the complainant declined to amend in the particular specified in the previous decree, his bill was dismissed.

This decree is now assigned for error.

THOS. H. LEWIS, for the appellant, contended,—

1. That the written agreement between the parties, in effect, is a mortgage.—*Lanfair v. Lanfair*, 18 Pick. 299; *Nugent v. Riley*, 1 Metcalf's R. 117; *Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania*, 7 Watts & Serg. 335; *Stewart v. Hutchins*, 6 Hill's (N. Y.) R. 143; *Foster v. Calhoun*, *Dudley's* (S. C.) R. 75; *Glass v. Ellison*, 9 N. H. 69; *Sims v. Canfield*, 2 Ala. 555.

2. If it were uncertain whether the instrument was a mortgage or a conditional sale, the law will construe it to be a mortgage.—*Turnipseed v. Cunningham*, 16 Ala. 501, and cases there cited; *Sewall v. Henry*, 9 *ib.* 85.

3. But, even if the instrument be construed to operate only as a conditional sale, complainant's remedy was in chancery, as his right to the negroes depended upon Raper's failure to perform his part of the contract, which failure was not then fully determined; neither could he, at that time, have had the right to the immediate possession. As his property in the negroes was clearly insufficient to entitle him to commence an action at law, chancery, having once rightfully taken jurisdiction for one purpose, will retain it for all purposes.

4. Chancery has jurisdiction to relieve against every species of fraud.—*Kennedy's Heirs and Executors v. Kennedy's Heirs*, 2 Ala. 194. If the bill, therefore, did not sufficiently charge a fraudulent combination, the amendment offered should have been allowed.

G. C. WHATLEY, *contra*, made the following points:—

1. The bill was properly dismissed, because a party is not allowed to prosecute two suits, at the same time, for the recovery or enforcement of the same right.—1 Dan. Ch. Pr. 362; 2 *ib.* 962-5.

2. The contract must be construed by the law of the place where it was made.—*Peake v. Yeldell*, 17 Ala. 644; *Jones*

v. Jones, 18 *ib.* 250. This agreement was entered into in North Carolina, and was fully construed there in Love v. Raper, 4 Ired. Eq. R. 475. That decision is the law of the case.—Price v. Price, 23 Ala. 611; Weaver v. Weaver, *ib.* 790. The contract has none of the *indicia* of a mortgage about it: there was no proposition to borrow money; no debt existed; and the legal title did not pass by the instrument.—Duval's Heirs v. McLosky, 1 Ala. 729; Sewall v. Henry, 9 *ib.* 85.

3. The complainant has an adequate remedy at law, against either Thomas or Crook—against the former, an action for damages; and against the latter, either detinue or trover. Walker and Wife v. McCulloch and Wife, 20 Ala. 391; Munroe v. Pritchett, 16 Ala. 785; Ellington v. Currie, 5 Ired. Eq. 23.

RICE, J.—We will not say, that an executory agreement cannot, in any case, have the same practical effect as an actual conveyance, so far as it may concern personal property. Franklin v. Hunt, 7 J. J. Marsh. 338; McDowell v. Hall, 2 Bibb, 610. But we hold it to be quite clear, that the agreement entered into by the appellant and Thomas Raper on the 18th March, 1844, shown in the exhibit to the bill, did not, *per se*, convey, transfer, or pass the legal title to the slaves therein mentioned, from the appellant to said Raper. On the contrary, that agreement shows that the appellant retained the legal title to the slaves, and that it was part of the contract that he should retain the legal title, until the sum of two thousand dollars, with interest, was recovered from said Raper, or from Wm. H. Thomas.—Bogan v. Martin, 8 Ala. R. 807; Barefield v. Murphy, at the present term.

If the appellant delivered the possession of the slaves to Raper, he did what he was not bound, either by the agreement or by law, to do. He must take the consequences of such voluntary act, and cannot found thereon a right to relief in a court of equity. If he chose to trust Raper with the possession of the slaves, and Raper thereupon asserted title in himself to them, in such manner as to make his possession adverse to the appellant; and such adverse possession has continued in Raper, and those deriving a claim from him, for

such a length of time as bars the action of detinue,—then the complainant is divested of his title, although he may never get his money. If, however, there is nothing to prevent his recovery in detinue, except the aforesaid agreement, that action will afford him a plain, adequate, and complete remedy. The agreement itself cannot prevent him from maintaining detinue for the slaves. His remedy is exclusively in a court of law, whether he goes for the money or the slaves.

The decree is affirmed, at the appellant's cost.

### DORRANCE vs. JONES.

[ACTION UNDER CODE FOR RENT ON DEMISE, BY LESSOR AGAINST ASSIGNEE OF LESSEE.]

1. *When general assignee for benefit of creditors becomes assignee of lease.*—If the lessee make a general assignment of "all his property whatsoever" for the benefit of his creditors, the trustee becomes bound as assignee of the lease, if he accepts the assignment and enters under the lease.
2. *What is sufficient acceptance and entry.*—If the trustee enter upon and take possession of the leasehold premises, and use them for the purpose of selling the goods assigned, this is such an acceptance and election as will bind him as assignee; and, the election once made, he cannot recede from it.
3. *Negotiable note does not extinguish rent.*—The negotiable note of the lessee, for the amount of the rent, is not an extinguishment of the rent reserved by the lease.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS suit was brought by Wm. Jones, jr., against Charles W. Dorrance, to recover rent accruing on a demise by plaintiff to one Kenneth King of a certain storehouse in Mobile. The complaint alleges the lease to King for the term of one year from the 1st day of November, 1853, at the rent of \$700, payable in four quarterly installments, for which said King executed his four promissory notes; that in February, 1854, said King assigned to the defendant the residue of the term then unexpired, and the defendant then entered into the pos-



session of the premises, and retained them until the expiration of the term. The only plea was the general issue.

On the trial, as the bill of exceptions shows, the plaintiff offered in evidence, 1st, his lease to King, which was in the usual form of a lease under seal, and which states that the notes for the rent were negotiable and payable at the Southern Bank of Alabama; 2dly, a general assignment, executed by said King on the 4th day of February, 1854, conveying his stock of goods, his outstanding accounts, bills, and notes, and "all his property whatsoever", to the defendant, in trust for the benefit of all his creditors, and authorizing him to take possession, convert into ready money, and with the proceeds pay all the debts *pro rata*; and, 3dly, "evidence tending to show that defendant, immediately after the execution of said deed of assignment, went into possession of the said premises leased to King." The defendant then introduced evidence, "tending to show that he went into the store to take possession of the stock of goods belonging to said King, and to dispose of the same; that he sold the bulk of said stock of goods, on the premises, at auction, on the 10th day of February, 1854; that before the 13th day of February, 1854, he tendered the key of the store to plaintiff's agent, who refused to receive it; that he made no further use of the store, which remained unoccupied, but the key remained with him until about the 1st day of November, 1854, when it was received by the plaintiff."

"Whereupon the court charged the jury, that if Dorrance went into possession simply to remove from the store the goods of his assignor, he is not liable to plaintiff for rent as assignee of the term; but if he entered into possession of the store described in the lease, not simply to remove the goods, but to sell said goods in the store, and to use the store for that purpose, whether he remained there for a day, an hour, or a month,—this amounted to an election to accept the term, and he became liable to the landlord for the rent reserved in the lease, as assignee of the term. The court charged the jury, also, that the fact of the lessor having accepted the negotiable notes of King, as described in the lease, did not affect the covenant in the lease to pay rent; and that Dorrance, as assignee of King, was bound to pay the rent."

The defendant excepted to these charges, and he now assigns them for error.

P. HAMILTON, for the appellant :

1. There is no privity of contract between Jones and Dorrance. The right to recover of defendant rests (if at all) in privity of estate. It was formerly held in England, that possession by the assignee must be shown, to complete the right. *Eaton v. Jaques*, 2 Doug. 455. This rule is said by some of the books to be overruled.—1 Brod. & Bing. 238, or 5 E. C. L. R. 72 ; 3 Bro. C. C. 166. The rule is shaken, if not overthrown, in England.—*Merchants' Insurance Co. v. Mazange*, 22 Ala. 179 ; 1 *Greenleaf's Cruise*, pt. I, p. 110, note. The law of this country is, that the liability depends on the assignee's possession.—*Astor v. L'Amoureux*, 4 Sandford's (S. C.) R. 524 ; *Greenl. Cruise*, *supra*.

2. Under the general assignment to Dorrance, as trustee for the benefit of King's creditors, the defendant occupied the position of an assignee under the English bankrupt law. 1 Bla. Com. 472, 480 ; Code, § 1556. In such case, the liability of the assignee is not perfected by his acceptance of the assignment, but by his election to enter and treat the term as assets.—*Bourdillon v. Dalton*, 1 Esp. 233 ; *Turner v. Richardson*, 7 East's R. 335-41 ; *Wheeler v. Bramah*, 3 Camp. 340-2.

3. The same is the recognized law of this country, as to general assignments by insolvents for the benefit of creditors. 6 Law Reporter, 317 ; 12 Barb. 263 ; *Burrill on Assignments*, 440. The effect of the American bankrupt law, in its operation as a deed of assignment, is as broad as the language of this deed.—5 U. S. Statutes, 442, § 3.

4. What amounted to an election was a question for the jury.—3 Camp. 340, *supra*.

5. The court erred in its charge as to the effect of the acceptance of King's negotiable notes.—*Howland v. Coffin*, 9 Pick. 52.

E. S. DARGAN, *contra*, cited the following cases :

1. As to the defendant's liability for the rent, as assignee of the term,—*Greenleaf's Cruise*, vol. 2, top p. 110 ; *Williams*

v. Bosanquet, 5 E. C. L. R. 72; Carter & Carter v. Hammett & Balch, 12 Barb. 253; Hannon v. Ewalt, 18 Penn. State (6 Har.) R. 9.

2. That the notes of King did not extinguish the rent,—Fowler v. Bush, 21 Pick. 230; Fowler v. Ludwig, 34 Maine R. 455; Chitty on Contracts, 660, 661, and note.

GOLDTHWAITE, J.—The assignment in this case was a general one for the benefit of creditors, and conveyed to the assignee “all the property whatsoever” of the assignor. It was accepted by the assignee; and although, under these circumstances merely, he may not have been bound as the assignee of the lease, he was certainly so bound, if he elected to accept the interest of the assignor, and to enter under it.—Carter v. Hammett, 12 Barb. 253; Bourdillon v. Dalton, 1 Esp. Cas. 233; Copeland v. Stephens, 1 B. & Ald. 593. Conceding that the acceptance of the assignment would not be sufficient, the only question is, whether taking possession of the store, for the purpose of selling the goods assigned, and actually selling them therein, amounted in law to such an acceptance. In Welch v. Myers, 4 Camp. 368, it was held by Lord Ellenborough, that the allowing of the bankrupt’s cows to remain on the farm for two days, and ordering them to be milked there, was an adoption of the demise, so as to make the assignees the tenants of the lessor. In Clark v. Hume, Ry. & Moody, 207, Abbot, C. J., held, that the assignee elected to accept the lease by using the premises for the benefit of the creditors. These cases establish the position, that taking possession of the leasehold estate, and holding it for the benefit of the creditors, though for ever so short a time, by virtue of the assignment, is the true test. We do not mean to say by this, that if the assignee entered only for the purpose of obtaining possession of the goods, it would be an acceptance; for that would, in no just sense, be taking possession of the premises. But certainly, if the assignee took possession of the store in order to use it, as the evidence shows it was used, as a place to sell the goods, it falls directly within the principle of the cases we have cited; and if that was the object, it is entirely immaterial how long the possession was retained, as when once the election was made, the as-

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signee could not recede from it.—Hanson v. Stephenson, 1 B. & Ad. 305.

That the taking of the notes did not operate to extinguish the rent, is a clear proposition.—Fowler v. Bush, 21 Pick. 230; Chitty on Contracts, 660, 661.

Judgment affirmed.

### MURPHY vs. BAREFIELD.

[BILL IN EQUITY TO REDEEM MORTGAGED SLAVES—CROSS BILL TO FORECLOSE.]

1. *Conditional sale construed.*—A written contract for the sale of several slaves, at a specified price for each, which uses present words of conveyance, and contains the additional stipulations, that two of the slaves are to remain in the possession of the vendor until the first day of January next thereafter, and that he “may redeem any and all the said negroes, at the valuation hereinbefore affixed to them, within twelve months”.—is not a mortgage, but a conditional sale, with a reservation of the right to re-purchase.
2. *Validity of subsequent contract between parties having conflicting claims to mortgaged property.*—Persons who have conflicting claims to slaves previously conveyed by mortgage or conditional sale, to which they were not parties, may by subsequent contract settle and adjust their rights to the property; and such subsequent contract itself, irrespective of the character of the former contract, must be considered as the ascertainment and adjustment between themselves of their rights.
3. *Subsequent contract construed.*—If, by such subsequent contract, after reciting the previous contract and the conflicting claims which have arisen to the property, it is stipulated and agreed that one of the two negroes shall remain in the possession of each party “until the sums for which they were respectively mortgaged by fully paid” unto the party of the second part, who claims to be the assignee of the original mortgagee, or purchaser; the party of the first part “relinquishing all further right”, and the party of the second part “obligating himself to convey to her perfect and complete titles whenever said sums respectively are paid”.—the transaction is not on its face a mortgage, and does not authorize a court of equity to grant any relief to either party founded on it.

APPEAL from the Chancery Court of Monroe.

Heard before the Hon. WADE KEYES.

THE original bill in this case was filed by Sarah Murphy



against Joseph Barefield, and alleged the following facts: That on the 2d day of January, 1846, one Duncan W. Murphy, being in possession of two slaves (Bill and Suckey), and being indebted to Mrs. Nancy Harris in the sum of \$2,297 60, mortgaged said slaves to her to secure said debt, and a copy of the mortgage, marked "exhibit A", is appended to the bill; that Mrs. Harris took possession under the mortgage of two of the slaves conveyed (Rachel and Tom), and has had their labor and services ever since, but the other slaves (Bill and Suckey, who alone are the subjects of this bill) were left in the possession of the said Duncan Murphy; that the negroes Bill and Suckey, at the time of the execution of this mortgage, were claimed by complainant as her own property, and said Duncan Murphy, recognizing her right to them, delivered them to her; that Mrs. Harris afterwards transferred and assigned to said Barefield (the defendant) the said mortgage, and her rights under it to said slaves; that Barefield, in the year 1847, without the knowledge or assent of complainant, took possession of the boy Bill, and threatened also to take Suckey; that he and complainant, in order to settle and compromise the controversy between them, entered into a written agreement respecting said slaves, which is appended to the bill, and marked "exhibit B"; that it was distinctly agreed and understood, at the time this last contract was entered into, that Barefield should convey and deliver up to complainant the boy Bill, whenever he should be paid the amount for which he was originally mortgaged to Mrs. Harris, and should likewise convey and deliver up Suckey, when she was redeemed; that Duncan Murphy has relinquished to complainant his right to redeem said slaves, and that she has frequently applied to Barefield for a statement and settlement of the said mortgage debt, which he refuses.

The prayer of the bill is, that an account may be taken of the mortgage debt, and of the hire and services of the slaves; that complainant may be permitted to redeem them, on paying the balance (if any) due on the mortgage; and for general relief.

"Exhibit A", above referred to, is as follows:

"Know all men by these presents, that I, Duncan W. Murphy, of the State of Alabama and county of Monroe, for and

in consideration of the sum of \$750 for a negro man by the name of Tom, \$500 for Rachel, \$500 for a negro woman by the name of Suckey, \$547 60 for a man by the name of Bill, to me in hand paid by Nancy Harris, of the county of Clarke and State of Alabama, do give, grant, bargain and sell all the right, title, claim and interest which I have in and to each and every one of the aforementioned negroes, to have and to hold, to herself and heirs, forever; it being expressly understood and agreed, that the said negroes Bill and Suckey are to remain in the possession of the said D. W. Murphy, until January, 1847; and it being further expressly understood, that the said Murphy may redeem any and all the aforementioned negroes, at the valuation hereinbefore affixed to them, within the time of twelve months of this date respectively. In witness whereof," &c.

(Signed by both parties, and attested by S. R. Davis.)

The subsequent agreement ("exhibit B") is as follows:

"Whereas, by certain articles of agreement, entered into on second day of January, 1846, between Nancy Harris and D. W. Murphy, a certain negro man, by the name of Bill, was sold by said Murphy to said Nancy Harris, for the sum of \$547 60, and also a negro girl, by the name of Suckey, for the sum of \$500, with a condition of redemption reserved to said Murphy, on the payment of the said sums of money respectively on or before the first day of January next thereafter; and whereas the said articles of agreement, since that time, have been transferred by said Nancy Harris to Joseph Barefield, who now has the entire interest arising out of said agreement referred to; and whereas a conflicting claim has been interposed by Sarah Murphy, to the said negroes above mentioned: Now be it known, that for the purpose of settling said conflicting claim, it is hereby agreed between the said Joseph Barefield and the said Sarah Murphy, that the said negro boy Bill shall remain in the possession of the said Joseph Barefield, and the girl Suckey in the possession of the said Sarah Murphy, until the sums for which they were respectively mortgaged by the said D. W. Murphy be fully paid unto the said Joseph Barefield; the said Sarah Murphy relinquishing all further right, and the said Barefield obligating himself to convey to said Sarah Murphy perfect and

complete titles, whenever said sums respectively are paid.  
In witness whereof," &c.

(Signed and sealed by both parties.)

The defendant answered the bill, denying that the contract between D. W. Murphy and Mrs. Harris, evidenced by "exhibit A" to the bill, was intended as a mortgage, but, on the contrary, alleging that it was an absolute sale of the slaves, and that an absolute bill of sale was executed at the time; that afterwards, on Murphy's representations that the slaves were family negroes, Mrs. Harris agreed to allow him the privilege of re-purchasing them within the time specified in the writing, and hired Bill and Suckey to him during the year. He denies that the complainant then had any right to the slaves, or that she asserted any; but admits that, on her afterwards asserting title to them, the contract evidenced by "exhibit B" to the bill was entered into for the purpose of settling their conflicting claims; and he denies that this writing is, or was intended to be, a mortgage. He alleges, also, that more than a reasonable time has elapsed since this last agreement was made, and yet the complainant has done nothing towards availing herself of the privilege, thereby secured to her, to redeem or re-purchase said slaves.

The defendant, after answering the original bill, filed a cross bill, asking that the complainant might be required, within a short time (to be fixed by decree of the court), to redeem said slaves under said agreement, and that, on her failure to do so, she might be forever barred of the privilege.

The testimony of S. R. Davis, the subscribing witness to the contract shown by "exhibit A", whose deposition was taken by the defendant, fully sustains the allegations of the answer as to the character of the transaction. He states that Murphy, being indebted to Mrs. Harris, had executed a deed of trust on his negroes to secure her, of which deed witness was trustee; that on failing to meet the debt, at the law-day of the deed, Murphy went with him to see Mrs. Harris, saying that he would prefer selling the negroes to her, as he could not raise the money, and thus avoid the expense of a sale under the deed; that the price of each negro was agreed on separately, and the sum total exceeded by a small balance the amount of the debt; that Mrs. Harris offered to pay this

balance in money, but Murphy said that he preferred to hire Bill and Suckey for the year, and this was assented to by Mrs. Harris; that Murphy then executed to Mrs. Harris an absolute bill of sale for the said four slaves, and the deed of trust was given up to him; that "some short while after this settlement, while the parties and witness were sitting together, Murphy said that he did not like to part with the negroes, because they were family negroes, and asked Mrs. Harris if he could redeem them, or any of them, by the first day of January next thereafter; that Mrs. Harris at first refused, saying that she had had a great deal of trouble about it, but she afterwards consented"; and that the writing exhibited with the bill was then executed, under this agreement.

On final hearing, the chancellor dismissed the bill and the cross bill, at the costs of the parties by whom they were respectively filed; from which decree each party now appeals, and here assigns it for error.

E. S. DARGAN, for the complainant in the original bill, contended that it was immaterial whether the contract between Mrs. Harris and D. W. Murphy was a conditional sale or a mortgage, since the parties to this suit, by their subsequent agreement, recognized it as a mortgage; that this subsequent agreement, by which the former contract was construed, is valid and binding on the parties themselves, and the courts will abide by their construction.

WILLIAMS & COCKE, *contra*, made the following points:

1. That the original contract between Murphy and Mrs. Harris, as shown by the testimony of Davis, was an absolute sale and purchase of the slaves, and the subsequent written agreement, if not *modus pactum*, was only a conditional sale, and not a mortgage; and, as the condition was not performed, Murphy could claim nothing under the contract.—Farrelly v. Robinson, 16 Ala. 472; Turnipseed v. Cunningham, *ib.* 507; McKinstry v. Conley, 12 *ib.* 678; Bryan & McPhail v. Cowart, 21 *ib.* 93; Sewall v. Henry, 9 *ib.* 24.

2. That the subsequent agreement between the parties to the suit was not supported by a sufficient consideration—the



“compromise of a conflicting claim”, which is not shown to be valid and subsisting.

3. That that agreement was not a mortgage, and will not be held a mortgage, even if the parties had so treated it.—Rogers v. Kneeland, 13 Wend. 114; 2 Edwards’ Ch. R. 138; 1 Powell on Mortgages, 139, note.

4. That the cross bill should have been sustained.—Story’s Equity Pleadings, §§ 397, 398, 399; Wickliffe v. Clay, 1 Dana, 589; Daniel v. Morrison, 6 *ib.* 187; 5 B. Mon. 515.

RICE, J.—The legal effect of the deed, set forth in exhibit A to the original bill, is, that the transaction between the parties to it, evidenced by its terms, was not a mortgage, but a conditional sale of the slaves by Duncan W. Murphy to Nancy Harris, with the right to re-purchase any or all of them within twelve months from its date, by paying within that period the respective values or prices fixed on them in the deed.—Bogan v. Martin, 8 Ala. 807; McKinstry v. Conly, 12 *ib.* 678; Goodman v. Grierson, 2 Ball & Beatty’s Ch. R. 274; Conway v. Alexander, 7 Cranch’s R. 237; 1 Powell on Mortgages, 138–39, and notes; Holmes v. Grant, 8 Paige R. 260; Glover v. Payn, 19 Wend. R. 518; Barrell v. Sabine, 1 Vernon, 268; Robinson v. Cropsey, 6 Paige’s R. 480; Brown v. Dewey, 2 Barb. Sup. Ct. Rep. 28.

Conceding, however, that said deed was intended by the parties to it as a mortgage, and is really a mortgage, it certainly was competent for the parties to this suit, who are not parties to said deed, to make a subsequent contract, which should define and fix their own rights to the property therein mentioned. This is what they have done. The subsequent contract is set forth in the original bill and exhibit B thereto; and must be considered as the ascertainment and adjustment between themselves of their rights to the property therein mentioned, which is the property involved in this suit.—Pinkard v. Ingersol, 11 Ala. 9; Lightfoot v. Strahan, 7 *ib.* 444; Wallis v. Long, 16 *ib.* 738; McKinstry v. Conley, 12 *ib.* 678.

This subsequent contract is not, on its face, a mortgage.—See authorities cited in first paragraph above. The complainant in the original bill does not aver or pretend that it was intended as a mortgage. The parties must abide by its terms.

There is no averment in the original or cross bill, which authorizes a court of chancery to decree any relief to either party, founded on said subsequent contract.—*McLeod v. Powe & Smith*, 12 Ala. 9.

The decree on the bill and cross bill must be affirmed; Sarah Murphy and her surety must pay the costs of her appeal, and Barefield and his surety must pay the costs of his appeal.

### MORTON vs. BRADLEY.

[ACTION UNDER CODE TO RECOVER DAMAGES FOR KILLING A SLAVE.]

1. *Civil action merged in felony.*—An action to recover damages for killing a slave cannot be maintained until there has been a prosecution for the felony; and the complaint, therefore, must aver such prosecution.
2. *What is sufficient averment of prosecution.*—An allegation that a prosecution was instituted against the defendant before the grand jury of the county, and that they refused to find a true bill against him for the killing,—held sufficient, on the authority of *Nelson v. Bondurant*, 26 Ala. 341.
3. *Statement of venue in complaint.*—When the name of the county is specified in the summons, and the complaint avers that the prosecution was had before the circuit court of "said county", the venue is laid with sufficient certainty.
4. *Specification of grounds of demurrer.*—Under a demurrer to the complaint because it does not show a sufficient prosecution, the objection cannot be raised that the venue is not well laid, since the Code (§ 2253) requires that the ground of demurrer must be distinctly stated.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by John Morton against John Bradley, and the original complaint was as follows:—

"The plaintiff claims of the defendant \$2,500, as damages for wrongfully killing a negro man slave, named Spencer, the property of the plaintiff, by shooting him with a gun, to-wit, on the 11th day of April, 1854, in the county aforesaid."

The defendant demurred to this complaint, assigning as the ground of his demurrer "that in the killing of said slave, as

alleged in the complaint, the defendant committed a felony, and the complaint does not show that he was prosecuted therefor before the commencement of this action." The court sustained the demurrer, but gave leave to the plaintiff to amend his complaint; and the complaint was thereupon amended by the addition of another count, in which, after repeating the previous allegations, the plaintiff averred "that afterwards, to-wit, at the Fall term, 1854, of the Circuit Court of said county, a prosecution was instituted against said defendant, before the grand jury for said county, at said term, and said grand jury did refuse to find a true bill against him for the killing of said slave; by means whereof this action accrues to plaintiff."

To the amended complaint the defendant interposed another demurrer, and assigned the following grounds of demurrer: "First, that in the killing of said slave, as alleged in said complaint, the defendant committed a felony, and said complaint does not show that he has been tried upon an indictment therefor; and, secondly, said complaint does not show that there has been any sufficient prosecution for said killing, to enable the plaintiff to maintain his said action." The court sustained this demurrer, and again granted the plaintiff leave to amend his complaint; and another count was then added to the complaint, containing this averment: "And plaintiff avers, that afterwards, to-wit, at the Fall term of this court, 1854, he instituted a prosecution against the defendant, for said alleged killing, before the grand jury for said county, and caused diligent inquiry to be made by said grand jury, whether said alleged killing was a felony, and whether said defendant, by said killing, was guilty of a felony; and said grand jury, after diligent inquiry into said killing, did refuse to find any bill of indictment against said defendant, for any offence for killing said slave. And said plaintiff further avers, that said killing was not, by the laws of this State, a felony."

To the complaint, thus amended, the defendant again demurred, on the following grounds: "First, that from the killing of said slave, as alleged in said amended count, the law presumed that a felony was committed, and yet said complaint does not show that said defendant, before the com-

mencement of said action, was tried and convicted, or acquitted, therefor, nor said killing ; secondly, that the allegation that said killing was not a felony, is not sufficient to rebut the presumption that said killing was a felony ; thirdly, that the allegations in respect to the action of the grand jury are not sufficient to rebut the presumption that said killing was a felony ; fourthly, that said count does not show any sufficient prosecution of said defendant, nor said killing, to enable plaintiff to maintain his said action ; fifthly, that the allegations of said amended count, in respect to said prosecution before said grand jury, are not sufficient to enable plaintiff to maintain his action." The court again sustained the demurrer, and, the plaintiff declining to make further amendments, rendered judgment for the defendant.

The rulings of the court on the several demurrers are now assigned for error.

E. W. PECK, for the appellant, cited the case of *Nelson v. Bondurant*, 26 Ala. 341.

TURNER REAVIS, *contra*, contended that the several demurrers were properly sustained, because neither count in the complaint showed in what county the slave was killed, nor in what county the grand jury investigated the case, and therefore failed to show a sufficient prosecution ; that as no county was named either in the caption, margin, or body of the complaint, there was nothing to which the words "the county aforesaid" could apply ; and that they could not be referred to the county named in the summons, because the summons and complaint are distinct things, and not parts of each other.

CHILTON, C. J.—The first count is clearly insufficient, as will appear by *Martin's Ex'rs v. Martin*, 25 Ala. R. 201. The demurrers to the two amended counts, which aver a prosecution of the defendant before the grand jury, and that said jury refused to find a true bill against him for the killing of the slave, should have been overruled. The case of *Nelson v. Bondurant*, 26 Ala. R. 341, sustains these two counts.

The objection, that the counts or complaints do not specify the



county in which the prosecution was had, is not tenable. The venue is laid in the summons, and it is averred in the complaint that the prosecution was had at the Fall term of the Circuit Court of "said county", &c. But the objection is untenable for another reason: it was not specified as one of the causes of demurrer, that the complaint failed to set forth the county in which the killing took place, and that the grand jury of that county had ignored a bill for the offence. The objection, to be available, must be distinctly stated in the demurrer.—Code, § 2253, p. 421. The general objection taken by the demurrer, that the complaint does not show a sufficient prosecution, merely raises the question whether a prosecution before a grand jury, and their refusal to find a bill of indictment, is sufficient, and not that the plaintiff should state the county in which the prosecution was had.

Judgment reversed, and cause remanded.

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### HINSON vs. PRESLOE.

[MOTION TO DISMISS APPEAL.]

1. *Security for costs held insufficient.*—An obligation, on the part of the appellant's surety, to pay the costs of the appeal "if the judgment is affirmed", is not a compliance with the statute.—Code, § 3041.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. C. W. RAPIER.

THE clerk certifies, in his final certificate appended to the transcript, "that the said John T. Henderson," for whose use the suit was brought, "has given bond, with John S. Wright, security, conditioned that, if the judgment be affirmed, he will pay the costs of the Supreme Court and of the Circuit Court"; and on this certificate the appellee now moves to dismiss the appeal.

NAT. HARRIS, for the motion.

WATTS, JUDGE & JACKSON, *contra*.

GOLDTHWAITE, J.—In cases of appeals, where no bond is given to supersede the judgment or decree, the Code (§ 3041) requires that the appellant shall give security for the costs of the appeal. The judgment in the present case was not superseded; and the obligation, which the surety of the appellant has entered into, only binds him to pay the costs of the appeal in the Supreme Court, in case the judgment of the court below is affirmed. This is not a compliance with the statute, since the surety would not be bound to pay the costs of the appeal if it was dismissed, as it might be if not taken within the time prescribed by law, as well as in other cases.

The motion to dismiss must accordingly prevail.

### AGEE *vs.* WILLIAMS.

[ACTION UNDER CODE FOR SPECIFIC RECOVERY OF SLAVE.]

1. When words “administrator,” &c., are *descriptio personæ*.—Where the complaint puts in issue the plaintiff’s individual title to the slave sued for, the super-added words “administrator,” &c., in the margin or caption of the complaint, are *descriptio personæ* merely.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. C. W. RAPIER.

THE defendant in this case was summoned “to answer the complaint of James Williams, administrator of Edward Williams, deceased”; and the complaint was as follows:

<p>“James M. Williams, adm’r of Edward Williams, dec’d, vs. William R. Agee.</p>	}	<p>The plaintiff claims of the defendant a negro man slave, by the name of Green, about forty years of age, together with the value of his hire during the detention, to-wit, from</p>
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the first day of January, 1849; said slave Green being of the value of \$1200."

The defendant pleaded "that the slave sued for is not the property of the plaintiff", and on this plea issue was joined.

On the trial, the plaintiff proved that said Edward Williams, during his lifetime, had possession of the slave sued for, as of his own property, from 1844 to 1848; and that said slave disappeared in 1848, and was found in the defendant's possession in March, 1853, who claimed title to him. The defendant then proved his bill of sale for said negro, dated in September, 1849, from a person calling himself James Walker, who had had the slave in his possession for several months previous to the sale; after which the plaintiff introduced evidence tending to show that said James Walker had stolen the negro. Several exceptions were reserved to the rulings of the court on the evidence, which it is unnecessary to state.

The court charged the jury, "that the plaintiff sued in his capacity as administrator of Edward Williams"; to which charge the defendant excepted, and which he now assigns for error.

WM. P. LESLIE, for the appellant, cited *Tate v. Shackelford's Adm'r*, 24 Ala. 510; and authorities there referred to.

S. J. CUMMING, *contra*, contended, 1st, that the summons and complaint sufficiently showed that the plaintiff sued in his representative, and not in his individual character; and, 2dly, that if the complaint was defective, it was a mere "defect of form", which might have been amended (Code, §§ 2227, 2402-5) in the court below, and which, therefore, will be considered amended in this court.

RICE, J.—It is clear, upon authority, that the plaintiff in the complaint in this case is James M. Williams as an individual, and not as an administrator of any intestate. The complaint does not put in issue the title of any intestate to the slave sued for, but only the title of James M. Williams as an individual. The words "administrator of Edward Williams", which follow the name of James M. Williams in the

margin or caption of the complaint, must be treated as *descriptio personæ*.—Arrington v. Hare, 19 Ala. 243; Tate v. Shackelford, 24 *ib.* 510; 1 Saund. Pl. & Ev. 497, 498; Chapman v. Spence, 22 Ala. 588.

Under the complaint, the plaintiff cannot recover upon mere proof of the title of any intestate, but must fail unless he proves title in himself as an individual; unless it be one of those cases, where proof of a mere prior possession in the plaintiff will enable him to recover. There is nothing in the record to show that it is one of this class of cases.—Herring v. Glisson, 2 Dev. R. 156; Traylor v. Marshal, 11 Ala. 458.

The charge of the court below is erroneous; and its judgment is therefore reversed, and the cause remanded.

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### DABBS vs. DABBS.

[BILL IN EQUITY BY HEIRS-AT-LAW AGAINST DEVISEES—ISSUES AT LAW TO TEST VALIDITY OF WILL AND DEED OF GIFT.]

1. *Order directing issue at law interlocutory merely*.—An order in chancery directing an issue at law is interlocutory merely, and may therefore be set aside at a subsequent term.
2. *When new trial may be refused*.—Although the inheritance is concerned, a new trial of the issue may be refused to the heir, notwithstanding the erroneous rulings of the court trying the issue, when, on all the evidence in the case, if the verdict of the jury had been against the validity of the will, a new trial should have been awarded.
3. *Error on trial of immaterial issue works no injury*.—Where issues at law are directed to try the validity of a will and of a deed of gift, which are so connected by words of reference that if the will is valid the deed cannot be held invalid, and the verdict of the jury establishes the validity of the will, the trial of the other issue is an immaterial matter, and its regularity will not be looked into on error.
4. *Costs*.—Where the verdict is in favor of the will, and the court trying the issue erroneously renders judgment for the costs against the heir, besides certifying the costs to the chancellor, by whom also they are decreed against the heir, the error is without injury.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. JAMES B. CLARK.



Dabbs v. Dabbs.

THIS bill was filed by Thomas G. Dabbs and others, the appellants, who are the children of John Dabbs and Nancy his wife, both deceased, and as such heirs-at-law of Jesse Dabbs, sr., deceased, their maternal grandfather, against the other heirs-at-law of said Jesse, who are John H. Dabbs, his son, and Jesse Dabbs, jr., his grandson. The objects of the bill are, to set aside the last will and testament of said Jesse Dabbs, sr., and also a certain deed of gift, both of which are charged to have been procured by fraud and undue influence on the part of the defendants; to obtain a discovery and account of the advancements made by the testator during his lifetime to the defendants; and to have the estate finally settled and distributed. The deed of gift, which was executed only three days before the will, conveys to the said John H. Dabbs 360 acres of land and five negroes; with the condition annexed, that he shall permit the donor, during his life, to hold, use, and enjoy them. The will contains the following reference to the deed: "Item 4. Whereas, on the 9th Sept. inst., I conveyed, by deed of gift, to my son John H. Dabbs, certain lands and negroes named and described therein, upon conditions therein contained: Now, in the event of my death, it is my will, that said John H. Dabbs shall take possession of said land and negroes, to have and to hold the same to his use, and to his heirs, forever."

At the May term, 1849, by consent of parties, feigned issues at law were directed, to try the validity of the will and deed; but at the succeeding May term, 1850, this order was vacated and set aside, on the petition of the defendants, "until such time as the cause shall be fully at issue by the filing of full and complete answers by the defendants." After the defendants had filed full answers, the trials at law proceeded; and the verdict of the jury, in each case, was in favor of the defendants, who were made to occupy the position of plaintiffs on the trials, in affirming the validity of the deed and will. Several exceptions were saved, during the progress of the trials, to the rulings of the presiding judge on the evidence, and were duly reserved by bills of exceptions; and on these exceptions a motion was predicated, before the chancellor, for a new trial of the issues. This motion the chancellor refused to grant, holding, in effect, that, as the erroneous rulings of

the court could have worked no injury to the complainants, the verdicts ought not to be disturbed. A judgment for the costs of the trials at law was rendered in each case against the unsuccessful party, and the costs were also certified to the chancellor, by whom, on final decree, they were awarded against the complainants.

The final decree rendered by the chancellor, the overruling of the motion for a new trial, the several rulings of the court on the trials of the issues, the rendition of the judgment for costs, and the setting aside of the order directing the issues at law, are the matters now assigned for error.

J. FALKNER, for the appellant.

JAS. E. BELSER, *contra*.

GOLDTHWAITE, J.—There was no error in setting aside the order directing the issue at law, as it was interlocutory merely; and decrees or orders of that character are always under the control of the court making them, until the final decree is rendered.—*Davis v. Roberts*, 1 S. & M. Ch. 543; *Roberts v. Cocke*, 1 Rand. 121; *Commonwealth v. Beaumarchais*, 3 Call, 122; *Cook v. Bay*, 3 How. Miss. 485.

In relation to the refusal of the chancellor to grant a new trial, we see no error. We have carefully examined all the evidence which the parties agreed to admit on the trial of the issue as to the will,—that which was admitted against the objection of the appellants, and that which was offered on their part and excluded; and we are fully satisfied that, had the first been rejected, and the last received, it should not have altered the result. Indeed, looking to all the evidence, if the verdict had been the other way, we should have regarded it as the duty of the chancellor to have granted a new trial; and under these circumstances, there was no error in overruling the motion, although the inheritance was concerned.—*Boothe v. Blundell*, 19 Vesey, 494, 503; *Alexander v. Alexander*, 5 Ala. 517, and cases there cited.

As to the deed, we agree with the chancellor, that the issue as to it was entirely unnecessary. If the will stood, the deed must stand. If the first was valid, the last could not be held invalid. This being the case, and there being no reason why

an issue as to the deed should be directed, we will not disturb the verdict which establishes only what was included in the other issue. We will not look into the regularity of a trial in relation to a matter as to which there should have been no trial.

Upon the question of the costs at law, it is only necessary to say, that they were certified to the chancellor, and were properly adjudged by him against the appellants. It may have been erroneous in the Circuit Court to have rendered judgment against them, but as it was proper they should have paid them, and as they were rightly decreed against them by the chancellor, there is no injury in the error.

Decree affirmed, at the cost of the appellants.

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### WINTER *vs.* PHELAN.

[ASSUMPSIT ON COMMON COUNTS FOR HAY SOLD AND DELIVERED.]

1. *Erroneous admission of evidence cured by instructions to jury.*—Although the admission of improper evidence is not cured, by a charge which leaves it discretionary with the jury to disregard it if they choose; yet a charge, which instructs them, in effect, notwithstanding such evidence, to find for the party against whose objection it was admitted, as to the single point on which it could have any possible bearing, cures the error of its admission.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

NAT. HARRIS, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

CHILTON, C. J.—Phelan brought assumpsit against Winter for, say, six hundred dollars, for hay sold and delivered to him, and proved on the trial that he had sold and delivered to him (Winter) about fifty tons of hay, worth, at Wetumpka, the place where the sale was made, twenty dollars per ton. Winter introduced a witness, who testified, that in

a conversation had with the plaintiff before the suit was brought, said plaintiff told him (the witness), that plaintiff had been very liberal to defendant, as he had agreed to let defendant have hay at the original cost of the same at the north, where plaintiff had bought it, with the cost of transportation of the same from the north added ; that this declaration was made in a casual or accidental conversation which witness had with the plaintiff, and that he (the witness) did not know whether the said hay was sold and delivered under any such special contract or not. This was all the proof tending to show a special contract. There was no proof tending to show in which one of the northern States the plaintiff bought the hay, or what he paid for it ; but the evidence tended to show that it had been shipped from the north to Wetumpka, *via* Mobile. The plaintiff was allowed to prove, against the defendant's objection, the price of hay in the cities of New York and Boston, two large commercial marts in the north where hay was bought and sold, about the time the proof tended to show the hay sold to defendant was shipped to Wetumpka from the north.

The court, in effect, charged the jury, at the request of the defendant, that if the hay sued for was sold under a special contract that the defendant was to pay the plaintiff for the same what it cost the plaintiff at the north, with the cost of transportation added. the plaintiff could not recover. This charge, which was asked by the defendant, and which is specific, setting out the proof, distinctly makes the recovery depend upon whether the hay was sold under the special contract proved ; inasmuch as it assumes, that if it was bought by the defendant under the special contract, the jury should find for the defendant, notwithstanding the other proof. If, therefore, we concede that the proof objected to was improperly admitted (a point which we do not decide), its admission could not have injuriously affected the defendant.

We fully concede the correctness of the doctrine laid down in *Hunley v. Carlisle*, 15 Ala. 625-6, that the admission of improper evidence is not cured by a charge from the court which leaves it discretionary with the jury to disregard such evidence if they choose : they must be left no discretion on



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the subject. Such we consider the effect of the charge in this case. We are distinctly informed, that there was no proof in which one of the northern States the hay sued for was purchased by plaintiff, or of what he had paid for it; and the charge, in positive and direct terms, tells the jury that, in the absence of such proof, if they find that the hay was sold under the special contract, notwithstanding the proof of the price of the hay in New York and Boston about the time the hay was shipped to Wetumpka, and the cost of shipping it, they must find for the defendant. It is clear that the jury must either have found that the hay was not bought under the special contract, or have disregarded the charge given them by the court. We cannot presume they did the latter; and if they did, it furnished ground for a new trial, and is not reached upon error.

As the error complained of could not have worked an injury to the appellant, the judgment must be affirmed.

### THOMAS vs. DE GRAFFENREID.

[QUESTIONS OF EVIDENCE ARISING ON TRIAL OF RIGHT OF PROPERTY IN CERTAIN SLAVES BETWEEN PLAINTIFF IN EXECUTION AND DAUGHTER OF DEFENDANT IN EXECUTION.]

1. *Answer not responsive to interrogatory, and stating opinion or legal conclusion, properly suppressed.*—A witness, testifying to a parol gift of a slave, was asked, on cross-examination, whether control and possession passed to the grantee at the time of the gift, or whether the grantor still retained possession; and answered, "I considered that the control and possession of the slave did pass to the grantee at the time, and the slave was known as his property from that time": *Held*, that the answer was properly suppressed, because it was not responsive to the interrogatory, and because it stated mere opinion and legal conclusion instead of facts.
2. *Retroactive effect of statute.*—Evidence tending to show a parol gift of a slave, cannot be rebutted by proof of a statute subsequently enacted, under which the gift would be invalid: since the statute cannot retroact on the gift, nor affect it in any way, it is irrelevant evidence.
3. *Injury presumed from error.*—Injury will be presumed from the erroneous admission of irrelevant evidence, unless the contrary clearly appears; since.

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if such evidence can do no other harm, it may obscure the real points in issue.

4. *Relevancy of evidence as tending to show ownership.*—Where the slaves in controversy lived and worked on the plantation owned by the defendant in execution, together with himself and his children, and constituted a part of his family, the fact that he furnished the family with necessaries, is evidence (though weak) tending to prove his ownership of the slaves.
5. *Relevancy of evidence as tending to disprove ownership.*—But the fact that the defendant in execution did not obtain credit on the faith of the slaves in his possession, is not competent evidence to disprove his ownership.
6. *General objection to evidence, of which part is legal.*—Where two depositions are offered in evidence, and are objected to “on the ground that no interrogatories, cross-interrogatories, or commissions issued to take the testimony of said witnesses or either of them”, the entire objection may be overruled if either deposition is unobjectionable.
7. *Declarations explanatory of possession.*—The answer of a third person, to a proposition to purchase one of the slaves in controversy, is not competent evidence, unless it is shown that the slave was in his possession, and the reply tended to explain that fact.
8. *Declarations in disparagement of title.*—Declarations made by the defendant in execution, while in possession of the slave in controversy, to the effect that said slave did not belong to him, but to the claimant, who was his daughter, although they may be entitled to but little (if any) weight, are admissible evidence for the claimant.
9. *Value of property at time of trial.*—The plaintiff in execution may prove the value of the property at the time of the trial.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. ANDREW B. MOORE.

TRIAL OF THE RIGHT OF PROPERTY in a slave named Jenny, and her two children, who had been levied on under execution in favor of the appellee against Athanasius Thomas and William Thomas, and a claim interposed by Mary Thomas, who was a daughter of said Athanasius. The claimant derived title to the slaves through a parol gift of Jenny’s mother, before the birth of Jenny, from said Athanasius Thomas to his son James, and a subsequent purchase by claimant from said James. For the previous report of the case, which was before this court at its January term, 1851, see 17 Ala. 602. The questions now presented by the assignments of error, arise out of the rulings of the court below on the evidence, and can only be fairly stated in the language of the bill of exceptions.

The plaintiff proved the levy on the slaves, in October, 1846, and their value at that time, and then offered to prove

their value at the time of the trial. To this the claimant objected, but the court overruled her objection, and allowed the proof to be made; and to this the claimant excepted.

After proving that the slaves were in the possession of the defendant in execution at the time of the levy, the plaintiff rested his case; and the claimant then introduced evidence tending to show a purchase by herself of the slave Jenny, in 1840, from James Thomas, and that Jenny had been in his possession some five or six years before her said purchase. "The claimant introduced proof, also, tending to show, that at the time of her said purchase, and for a number of years previous to that time, her father (Athanasius Thomas), herself, and her brothers, of whom James Thomas was one, lived together in South Carolina, upon the same farm, and in the same house; but they worked different parts of the farm, each to himself, and the proceeds of whatever was raised on the farm for sale was taken each part to the individual who had produced it; and that the corn, &c., which was raised upon the farm, was consumed in common by the family. Claimant proved, also, that her father, herself, and several of her brothers, all being unmarried, removed together to Alabama in 1843; that her father married in 1844, and moved off to himself in 1845, while the negroes remained with and worked for her, both before and after his marriage; and then read the deposition of Mrs. Eleanor Todd", who testified to a parol gift of a slave named Lucy, who was the mother of Jenny, from Athanasius Thomas to his son James, in the year 1812. The deposition of this witness was taken by the claimant; and cross-interrogatories were filed by the plaintiff, of which the sixth and ninth, with the answers thereto, were as follows:

*Sixth Cross-Interrogatory.*—"Did the control of Lucy pass from Athanasius Thomas to James or William at the time of the gift mentioned by you? Did the possession of Lucy pass, at the time of the gift, to either James or William Thomas"?

*Answer.*—"I considered that the control of Lucy did pass, at the time of the gift, from Athanasius to James Thomas. I also considered the possession to pass to James Thomas at the time of the gift."

*Ninth Cross-Interrogatory.*—"Did not Athanasius Thomas, after the gift, continue in the possession of Lucy, just as he

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had done before, so long as you lived near or visited the family"? *Answer*.—"Athanasius Thomas, after the gift, had charge of the plantation, until William and James took charge of it; but the negro Lucy was known as the property of James Thomas, from the time of the gift, until I left South Carolina."

The court sustained a motion to suppress each of these answers, and excluded them from the jury; and to this the claimant excepted.

"The claimant introduced other evidence, corroborative of the above, and then closed her case"; and the plaintiff then offered in evidence a certified copy of a statute of South Carolina, passed in 1832, which enacted "that no parol gift of any chattel shall be valid, against subsequent creditors, or purchasers, or mortgagees, except when the donee shall live separate and apart from the donor, and actual possession shall, at the time of the gift, be delivered to, and remain and continue in, the donee, his or her executors, administrators, or assigns." The claimant objected to the reading of this statute in evidence, on the ground that it was irrelevant; but the court overruled the objection, and claimant excepted.

The plaintiff then offered the deposition of Coleman Crosby, which was taken on interrogatories and cross-interrogatories; and the claimant having declined to read the answers to the cross-interrogatories, the plaintiff offered them in evidence. This witness, who was a near neighbor of Athanasius Thomas before the latter left South Carolina, and who testifies to divers acts of ownership over the slaves by said Thomas, in part of his answer to the second interrogatory, says, "*I never knew any one to purchase necessities for the family, except Altha. Thomas*"; in part of his answer to the third interrogatory,—"*I know of no means of purchasing that either James or Mary had. James was not industrious in his habits, and worked but little on the farm,—not more than pay his board; and Mary had no employment, except attending to her father's household affairs. I never knew of any funds that she had acquired, and do not know how she could have acquired any to purchase negroes*"; and in part of his answer to the second cross-interrogatory,—"*James Thomas never, to my knowledge, had possession, or in any manner claimed, the ne-*



groes Jenny and her children and Lucy." The claimant made a separate objection to that portion of each of these answers which is italicized, on the ground that it was irrelevant, illegal, and incompetent; but the court overruled each objection, and the claimant excepted to its rulings.

∴ The plaintiff then offered to read in evidence the depositions of Darling Allen and Allbon Boulware. Claimant objected, on the ground that no interrogatories, cross-interrogatories, or commissions issued to take the testimony of said witnesses, or either of them. Plaintiff then proved, that interrogatories and cross-interrogatories had been propounded to Darling Allen and Osborn Bolar, and commissions issued to take their testimony; and that these depositions were read in evidence upon a former trial"; and then read to the court an agreement of counsel, in effect, that they waived all objections to any informality or irregularity in the depositions taken in the cause, and reserved only all objections to the relevancy and legality of the evidence." Thereupon, the court overruled the objection, the depositions were read, and the claimant excepted.

The witness Allen, in answer to the second interrogatory, after stating that he lived for several years on a plantation adjoining that occupied by Athanasius Thomas before he left South Carolina, and that he saw said Thomas, almost daily, managing, controlling, and giving directions to the negroes in his possession, says,—"*The land he lived on, he professed to own in his own right. I know nothing about his paying rent. Mary, James, and William all lived with the old man until they left, except William, who was married about the year before they left, and lived to himself afterwards on a part of the same plantation on which the old man lived. I know that Atha. Thomas provided for the family. I know that he repeatedly purchased necessities for the family, and I never knew, or heard, of any one else doing so at any time.*" To the first italicized portion of the answer the claimant objected, "on the ground that it was irrelevant and incompetent, and that there was better evidence of the ownership of the land than his possession"; and to the latter portion, because it was irrelevant. The court overruled both the objections, and the claimant excepted.

This witness says, also, in his answer to the third interrogatory, "Mary Thomas had no employment, except attending to the affairs of her father's house. I never knew, or heard, of any funds that she had acquired, and I know not how she could have acquired any. I never knew, and never heard, of any purchase of Jenny and her children, by Mary from James Thomas; nor did I ever hear of any swap, or trade, for said negroes; nor was there ever any transfer of possession or control of said negroes from one to the other." The claimant objected to those portions of this answer, "in which the witness states that he never knew of any means Mary Thomas had of purchasing property, nor did he ever hear of any swap or trade for said negroes", as being irrelevant and illegal; but the court overruled each of the objections, and the claimant excepted.

"The claimant then introduced one Clough Shelton as a witness, who testified, that he resided in South Carolina, at the time and before said Athanasius Thomas and claimant left there, and near to their residence; that he went to their residence, about a month before their departure, and while the negro Jenny was there, with the intention of trying to purchase her. Witness was then asked, if he made any proposition to any one to buy said negro, in the presence of said Atha. Thomas; and, if so, to whom, and what Atha. Thomas said in reply. The plaintiff objected to this question, and the court sustained the objection; and to this the claimant excepted. Claimant's counsel then stated to the court, that he expected to prove that said Atha. Thomas, while Jenny was in his possession, in the winter of 1842-3, said to this witness, that Jenny did not belong to him, but belonged to Mary; and requested permission to ask the witness for such proof. The court refused permission, and claimant excepted.

"The claimant introduced another witness, who stated, that he had known Atha. Thomas and his family, intimately, for some thirty years; that he lived in their immediate neighborhood, for several years preceding 1838, knew them then, and had known them since that time down to 1846; and that he was well acquainted in the neighborhood in which said Atha. Thomas lived in South Carolina. Claimant then proposed to prove by this witness, that Atha. Thomas did not

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obtain credit in South Carolina on the faith of the negroes he had in possession. The plaintiff objected to this evidence, and the court sustained the objection ; and claimant excepted."

All these rulings of the court are now assigned for error.

WHITE & PARSONS, for the appellant.

JAMES B. MARTIN, *contra*.

GOLDTHWAITE, J.—There was no error in sustaining the objection made to the answer of the witness Todd to the sixth cross-interrogatory, for the reason, that it did not answer as to the fact inquired of, but simply gave the opinion of the witness in relation to it. So, also, as to the objection made to the answer of the same witness to the ninth cross-interrogatory. The question relates solely to the possession ; and the reply is, that the property was known to belong to the person through whom the defendant below claimed—thus assuming the real question at issue, and announcing the conclusion of herself and others as to that fact. That portion of the answer was neither a response to the question, nor was it legitimate evidence, for the reason, that it was here a purely legal conclusion. It is true that part of the answer, which stated that the defendant in execution remained in charge of the plantation, may have been proper, under the decision of this court when the case was last here (17 Ala. 602); but, as the part referred to could only have operated in favor of the objecting party, the other side could not complain.

In relation to the statute of South Carolina, of the 20th December, 1832, we are unable to perceive its relevancy. The simple question, under the pleadings, was, whether the slaves levied on were subject to the execution ; and the plaintiff had offered testimony, conducing to show that the defendant in execution was the owner of the property, by evidence of his possession of and control over it. The claimant attempted to establish her right, by proving a gift of the property to her in 1812 ; and the plaintiff, to rebut this evidence, offered a law passed twenty years afterwards, declaring, in effect, all *parol* gifts invalid against subsequent creditors and purchasers, unless the donee lived separate and apart from the donor, and actual possession at the time of the gift was delivered

and continued in the possession of the donee. This law certainly could not have any effect on gifts made before its passage, and there is not any evidence of one made after the period of its enactment. The gift relied on, if made at all, was made long before that time, and could not, if valid, be affected in any way by the act subsequently passed.

The claimant may not have been injured by this testimony ; but we are not fully satisfied of this. As juries are constituted, it is very difficult to say what effect this or that evidence is to have upon their minds. If irrelevant testimony can do no other harm, it may raise a cloud, and observe the real points ; especially when it goes to them with the sanction of the court as to its materiality. The safe rule, and the one on which we have acted, is, that injury is always to be presumed from error, unless the contrary clearly appears ; and where irrelevant evidence has been admitted, the absence of injury must be very plain to allow us to sanction the error. *Frierson v. Frierson*, 22 Ala. 549.

In relation to that part of the answer of the witness Crosby to the second direct interrogatory, which states that the witness never knew any one to purchase necessities for the family of Athanasius Thomas, the defendant in execution,—it may be evidence of a very weak character, but it is not irrelevant. The family, as we understand it, included the slaves which were the subject of contest ; and the improbability that a person who did not own them should for years supply them with necessities, is enough to sustain the admissibility of this testimony. The part of the answer of the same witness to the third direct and second cross-interrogatory, which was objected to, was decided, when the case was last here, against the appellant.

The offer to show that the defendant in execution did not obtain credit in South Carolina upon the faith of the slaves he had in possession, was irrelevant, and the objection to it was properly sustained. The issue here was, whether the title was in the claimant, and the evidence offered was incompetent to sustain it.

In relation to the objections which were made to the depositions of the witnesses Allen and Boulware, it is only necessary to observe, that if it were conceded that the deposition



of the last witness would have been inadmissible if objected to separately, yet, as the objection was general, and went to both depositions, it was properly overruled, as there is nothing which would warrant the exclusion of the deposition of Allen. This point has been so often determined by this court, as to render it unnecessary to cite authorities.

Neither was there any error in overruling the question propounded on the part of the appellant to the witness Shelton. The reply made by a third person to a proposition to buy one of the slaves, the ownership of which was in question, would not be evidence, unless it was shown that the person by whom it was made was in possession of the slave at the time, and unless the reply tended to explain that fact. If the possession had been proved, the question as asked was too broad, as it would admit of any answer, whether relating to the possession or not. It should have confined the reply sought for to statements relating to the possession.

As to the facts which the claimant offered to prove by this witness, we can see no objection. They were simply declarations, made by a party in possession, that the property belonged to the claimant, and tended to show that he held in subordination to her,—impliedly, at least, referring his possession to her ownership; and under our decisions, evidence of this character was admissible.—*Beall v. Ledlow*, 14 Ala. 523; *Nelson v. Iverson*, 17 Ala. 216. Statements like these, where, from the situation of the party, there is an obvious motive for representing the ownership to be in another, may be entitled to but little (if any) weight; but still they are admissible for what they are worth. Whether the offer to prove the facts referred to was objectionable, on the ground that it proposed to do so by propounding leading questions, it is unnecessary to decide, as it is not probable the same question will arise on another trial.

There was no error in allowing the proof of the value of the slaves at the time of the trial (*Borland v. Mayo*, 8 Ala. 103); nor in allowing the declarations of Athanasius Thomas, while in the possession of the plantation, that he held it in his own right; nor in the objections which were made to portions of the answers of the witnesses Crosby and Allen, which were discussed and determined when the case was last here.

The judgment must be reversed, and the cause remanded.

## MAXWELL vs. THE STATE.

[INDICTMENT FOR RETAILING WITHOUT LICENSE.]

1. *Selling to person of known intemperate habits, in quantity greater than quart, not within statute.*—Selling vinous or spirituous liquors, to a person of known intemperate habits, in quantities greater than a quart, is not a violation of the statute.—Code, § 1058.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

ROBERT MAXWELL, the appellant, was indicted at the March term, 1854, for retailing without a license; the indictment charging that he "sold vinous or spirituous liquor without a license and contrary to law", and that he "sold spirituous liquor to one George Taylor, a person of known intemperate habits, by the quart, without a license and contrary to law." On the trial, as the bill of exceptions states, "the State proved that the defendant, within twelve months before the finding of the indictment, and in said county, had sold to George Taylor, a man of known intemperate habits (which fact was known to said defendant), one half-gallon of whiskey, none of which was drunk upon or about the premises of said defendant; and this was all the testimony in the cause. Thereupon, the defendant asked the court to charge the jury, that the aforesaid testimony did not support the charge in the indictment; which charge the court refused to give, and the defendant excepted." The refusal to give this charge is now assigned for error.

E. W. PECK, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

GOLDTHWAITE, J.—The Code (§ 1058) does not make the selling of vinous or spirituous liquors, in quantities greater than a quart, to a person of known intemperate habits, an offence; and hence, upon the evidence stated in the bill of exceptions, the charge requested should have been given.

Judgment reversed, and cause remanded.

BRIDGE & CO. *vs.* McCULLOUGH'S ADM'RS.

[IN THE MATTER OF AN INSOLVENT ESTATE.]

1. *When partnership creditors cannot share with separate creditors in estate of deceased partner.*—When the estate of the deceased partner is not sufficient to pay its separate debts, and the surviving copartner has a joint fund in his hands, the partnership creditors are not entitled to share equally with the separate creditors in the estate of the deceased partner.
2. *When and by whom objection may be raised to payment of partnership debt out of estate of deceased partner.*—After a claim against an insolvent estate has been allowed without objection, and the time within which objections are required to be made has expired, the administrator may still move to postpone its payment until after the separate debts shall have been satisfied, on the ground that it is a partnership debt, which is not entitled to share equally with separate debts.

## APPEAL from the Court of Probate of Mobile.

IN THE MATTER of the estate of Charles McCullough, deceased, which was declared insolvent on the 22d March, 1852. Among the claims which were filed against said estate, within the time prescribed by the statute and the order of the court, were the claims of J. & L. K. Bridge & Co. and J. & G. C. Alexander & Co., who are the appellants in these two cases; and to the allowance of their claims no objection was raised. On the 5th December, 1854, no person having been nominated to the court by the creditors of the estate as administrator *de bonis non*, the former administrators were continued in office; and the court then rendered a decree, allowing the claims filed against the estate to which no objections had been made, and citing the administrators "to a final settlement of their accounts, and a distribution of the proceeds of said estate, as by law required, on the 9th December, inst."

On the day appointed, all the parties interested in the estate being present, the court proceeded to audit and examine the accounts and vouchers of the administrators, ascertaining the amount of money in their hands, and the credits to which they were entitled. The administrators then filed a written motion, "to postpone the payment of the claims of J. & L. K. Bridge & Co. and J. & G. C. Alexander out of the assets of

said estate, until after the payment of the claims of the individual creditors of said McCullough, because said claims are debts due by the firm of Coffin & McCullough, which was composed of said McCullough and C. G. Coffin ; that said Coffin is now surviving, and the personal assets in the hands of said administrators are not more than sufficient for the payment of the individual creditors of said McCullough ; and that said Coffin, as surviving partner, received funds after said McCullough's death, belonging to said firm, and administered the same." The appellants "objected to the right of said administrators to interpose in this case, at this time, with any such motion, and moved the court that the same be taken from the files of the case ; but the court overruled their motion, and said plaintiffs excepted."

The administrators then offered evidence in support of their motion, to the introduction of which the appellants objected ; but the court overruled their motion, and they thereupon excepted. Evidence was adduced by both parties, in support of their respective positions, on the facts involved in the administrators' motion, and several exceptions were reserved to the rulings of the court on the evidence ; but it is unnecessary to notice these matters, as they are not passed upon by this court. On all the evidence adduced, the court sustained the motion of the administrators, and postponed the payment of the appellants' claims until after the separate debts had been fully satisfied ; holding, that these claims were partnership debts, that the moneys in the hands of the administrators were not sufficient to pay all the individual debts in full, and that there were partnership assets in the hands of the surviving partner ; and the appellants excepted to this decision.

Each of the appellants sued out an appeal from the decree of the court postponing their claims, and here assigned for error the several rulings of the court above stated ; and the two causes were argued and submitted together.

JOHN T. TAYLOR, for the appellants.

O. S. JEWETT, *contra*.

RICE, J.—We have re-examined the points decided in *Smith & Co. v. Mallory's Ex'r*, 24 Ala. 628, and are fully con-



vinced that they were well considered, and correctly decided. Upon the authority of that case, we must affirm the decrees in the two cases now under consideration. The action of the court below, in all respects, was authorized by law, and we cannot sustain the objections thereto made by the appellant.

Decree in each case affirmed.

### GUNN *vs.* HOWELL.

[ASSUMPSIT FOR MONEY HAD AND RECEIVED—PLEA OF PAYMENT TO PLAINTIFF'S CREDITOR UNDER JUDGMENT RENDERED IN GEORGIA ON PERSONAL SERVICE OF GARNISHMENT.]

1. *How foreign statute must be pleaded.*—As a general rule, where a party claims a right, based, not upon the common law, but upon a statute of a foreign jurisdiction, it devolves upon him to prove that statute as a fact; and in pleading, he is required to set out the statute, in order that the court may see that the right claimed is in conformity with it.
2. *How judgment of sister State must be pleaded.*—But, in pleading the judgment of a sister State, to which “full faith and credit” are to be given (U. S. Constitution, Art. IV, § 1), it is not necessary to set out affirmatively the facts upon which the power and authority of the court by which it was pronounced depended.
3. *Summary proceeding must pursue statute.*—Where a special authority, in derogation of the common law, is conferred by statute on a court of general jurisdiction, it becomes, *quoad hoc*, an inferior or limited court; a compliance with the requisitions of the statute is necessary to its jurisdiction, and must appear on the face of its proceedings.
4. *Judicial ascertainment of jurisdictional fact.*—Where the jurisdiction of the court to proceed in the summary mode provided by the statute depends upon the existence of a preliminary fact, as where an execution, with a return of “no property,” is required before process of garnishment can issue, the record must affirmatively show either the existence of the fact itself, or that the court determined its existence; but if the court erroneously determine that the fact does exist, its actual existence cannot be collaterally inquired into, and the error does not affect the validity of the proceedings.
5. *Georgia statute of garnishment construed.*—The effect of the last proviso to the second section of the Georgia statute of 23d December, 1822, (Prince's Digest, p. 37.) is to require the issue of an execution, and a return thereon of “no property found,” before process of garnishment can issue to enforce satisfaction of the judgment.
6. *Of what record in garnishment case consists.*—Where process of garnishment is

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Gunn v. Howell.

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sued out under this statute, to enforce satisfaction of a judgment, the record of the garnishment case consists only of the affidavit and summons, the return of the officer, the answer of the garnishee, and the judgment thereon rendered against him ; but neither the judgment against the original debtor, nor the execution thereon issued, constitutes any portion of the record of the garnishment suit, unless incorporated into the judgment against the garnishee, or made part of the record by bill of exceptions.

ERROR from the Circuit Court of Chambers.

Tried before the Hon. NAT. COOK.

THIS action was brought by Larkin R. Gunn against Isaac Howell, to recover the proceeds of certain promissory notes, amounting in all to about \$2,500, which plaintiff had placed in defendant's hands for collection. The declaration contained a special count on the contract, and the common money counts. The defendant pleaded the general issue, payment, set-off, former adjudication, the statute of limitations, in short by consent ; and his sixth plea was as follows :—

“That plaintiff ought not to have or maintain his aforesaid action against him, because he says, that after the making of said several promises and undertakings in said declaration mentioned, and before the commencement of this suit, said plaintiff and one Archibald G. Jones were indebted to Malcolm Johnston and Samuel Johnston, as administrators of James M. Calloway, deceased, in a large sum of money, to-wit, the sum of \$1,500 principal debt, and \$170 interest thereon up to the 7th day of March, 1839, and in the further sum of \$20 18 costs, by a judgment recovered in behalf of the said James M. Calloway, now deceased, against said plaintiff and said Archibald G. Jones, on said 7th March, 1839, in the Superior Court of Taliaferro county in the State of Georgia, which said court had jurisdiction of said cause ; that said Malcolm and Samuel Johnston, administrators of said James M. Calloway, deceased, afterwards, to-wit, on the 7th day of March, 1842, did make an affidavit, in pursuance of the statutes of the State of Georgia, of the amount of the demand due to them, as such administrators, by said plaintiff and A. G. Jones, and that they were apprehensive of the loss of the same, or some part thereof, unless summons of garnishment issued, and at the same time did give bond and security, as required by the laws of said State of Georgia, conditioned to

pay and satisfy all costs which might be incurred by said plaintiff and A. G. Jones, or either of them, in case they discontinued or were cast in their said suit, and also all damages which might be incurred against them for suing out said process of garnishment; that the clerk of said Superior Court of said Taliaferro county, on the day and year last aforesaid, did issue a summons of garnishment, in pursuance of said affidavit and bond so made and given as aforesaid, and the same was afterwards, to-wit, on the 7th day of March, 1842, served on this defendant, requiring him to be and appear before said Superior Court on the first Monday in September next thereafter, to answer on his oath as garnishee of the said plaintiff and A. G. Jones; that this defendant afterwards, to-wit, on the 7th day of March, 1843, during the session of said Superior Court, filed his answer in writing in said court, as the garnishee of said plaintiff and A. G. Jones, which said answer was in the words and figures following," &c.

The garnishee's answer, which is then set out at length in the plea, admits an indebtedness to said Larkin R. Gunn to the amount of \$2,011 58, cash in hand, the proceeds of certain notes placed by him in the garnishee's hands, and that he has in his possession certain executions, issued from justices' courts, on judgments rendered on others of said notes. The plea then avers, "that afterwards, to-wit, at the same term of said Superior Court, a judgment was rendered against him, on his said answer as garnishee of plaintiff and A. G. Jones, in favor of said Malcolm Johnston and Samuel Johnston, administrators of said James M. Calloway, deceased," which judgment is then set out *in extenso*; "that defendant afterwards, to-wit, on the 8th day of March, 1843, did deposit with the clerk of said court the executions mentioned in his said answer, and specified in said judgment, in pursuance of the order of said court contained in said judgment; and did afterwards, to-wit, on the 14th day of March, 1843, pay off and discharge said judgment in full, so rendered against him as the garnishee of said plaintiff and A. G. Jones. And this defendant avers, that said Superior Court of Taliaferro county, in the State of Georgia, had jurisdiction to issue said summons of garnishment, and to give judgment against this defendant on his said answer, as garnishee of said plaintiff

and A. G. Jones ; that the indebtedness by him to said plaintiff, as set forth and contained in his said answer, upon which said judgment was so rendered against him, and which was so paid off and satisfied in full by him, was the very same identical indebtedness as that now declared on and contained in plaintiff's said declaration ; that the entire indebtedness then due by him to said plaintiff was attached and condemned by said Superior Court of Taliaferro county, Georgia, to pay and satisfy said judgment in favor of said James M. Calloway, deceased, against said plaintiff and A. G. Jones, which said judgment, with interest, amounted to a larger sum than was then due by this defendant to said plaintiff ; and that said judgment, so rendered in favor of said Malcolm Johnston and Samuel Johnston, as administrators of said James M. Calloway, deceased, against this defendant, as garnishee as aforesaid, up to the time of its said payment and satisfaction, to-wit, on the 14th of March, 1843, remained in full force and effect, not in the least reversed, satisfied, or made void. And this he is ready to verify by the said record," &c.

A demurrer to this plea was interposed, and overruled.

On the trial, as the bill of exceptions states, "the plaintiff proved, that he had in the hands of an agent, residing in said Taliaferro county, Georgia, notes, or evidences of debt, amounting to about \$2,500 ; that about the year 1840 an agreement was entered into between himself and the defendant, both of whom then resided (and have since continued to reside) in Alabama, that said defendant, who was about visiting Georgia on business of his own, and who was indebted in that State, should take charge of these notes and evidences of debt belonging to plaintiff, and should account to plaintiff for the amount he might collect thereon, and for the amount of the demands he might use in payment of his own debts ; that defendant, in pursuance of this agreement, went into Georgia, took charge of said demands belonging to plaintiff, put the same in the train of collection, and returned home ; that he again went into Georgia, in March, 1842, and succeeded in collecting the sum of \$2,267 90 on plaintiff's said demands, and, after deducting therefrom the expenses of collection and for his services, and the further sum of \$144 53 paid to plaintiff before the collection of the money on his said



demands, had left in his hands, belonging to plaintiff, the sum of \$2,011 58, besides other judgments on which the money could be made, which sum (\$2,011 58), upon his return home, he refused to pay over to plaintiff, and to recover which this suit is brought."

The defendant then offered in evidence, in support of his sixth plea, a transcript of the record of the garnishment suit therein referred to, which may be thus described : It commences with the original petition which was the foundation of the action brought by James M. Calloway against Larkin R. Gunn and Archibald G. Jones, on the filing of which a summons was issued, which was returned executed on Gunn by the sheriff. The defendant's plea and answer is then set out ; after which follow the verdict of the jury, in favor of the plaintiff, and the judgment thereon rendered on the 7th March, 1839. On this judgment an execution was issued on the 14th March, 1839, in which the judgment is described as having been rendered in favor of Malcolm Johnston and Samuel Johnston, as administrators of Calloway, and on which the sheriff made the following return : " I know of no property subject to the within *f. fa.*, this 16th March, 1839." The affidavit made by Malcolm and Samuel Johnston, administrators of said Calloway, on the 7th March, 1842, to procure the issue of a garnishment on this judgment, and the bond given by them, next appear in the transcript. No writ, or other process of garnishment, appears in the record ; but on a certified copy of the affidavit, issued by the clerk, the sheriff returns that he has summoned Isaac Howell as garnishee to appear and answer at the next term of the court, on the first Monday in September next. In answer to this summons, the garnishee filed a plea on the 7th March, 1843, alleging that he was a non-resident, and therefore not subject to the process ; but the court overruled his plea, and ordered him to answer. The answer of the garnishee, and the judgment thereon rendered by the court, condemning the money in his hands admitted by the answer, are then set out ; and the clerk's receipt for the executions, which the garnishee was ordered to hand over to him, together with Malcolm Johnston's receipt for the amount of the judgment (\$2,011 58), dated 14th March, 1843, are annexed. The certificates of the

clerk and judge, appended to the transcript, seem to be correct, and no objection was raised to them.

"Evidence was further introduced, tending to show that the defendant, while he was temporarily in the State of Georgia in March, 1842, and after the collection of the money by him, and before his return and refusal to pay over the money, was served with a writ of garnishment, as shown by said record. The defendant read in evidence, also, the first section of the third article of the constitution of the State of Georgia, found in Prince's Digest, on page 909. From the same book was read, on pages 36 and 37, 'an act to authorize parties plaintiff to issue summons of garnishment in certain cases as in cases of attachments,' of December 23, 1822; also, 'an act to amend an act to authorize parties plaintiff to issue summons of garnishment in certain cases as in cases of attachments,' passed December 23, 1822, approved December 20, 1823; also, on page 41, an act which was passed on the 22d December, 1834, together with the third section of an act (on page 33) passed 14th November, 1814; and all the laws of Georgia, in force, on the subject of garnishment and jurisdiction.

"Upon this state of proof in the cause, the following charges were severally asked by the plaintiff, and refused by the court:—

"1. If the jury should believe from the evidence, that judgment was rendered in favor of James M. Calloway, on the 7th March, 1839, and that execution was issued on this judgment on the 14th of the same month, and was returned by the sheriff in these words, 'I know of no property subject to the within *fl. fa.*, this 16th March, 1839',—this was not such an issuance and return as was required by the statutes of Georgia, so as to authorize the issuance of garnishment process against a defendant in said judgment in favor of Malcolm Johnston and Samuel Johnston, as administrators of said Calloway.

"2. If they should believe that a judgment was rendered in favor of James M. Calloway, in March, 1839, and that execution was issued and returned as shown by the record, that such issuance and return *would not, after the decease of said Calloway, and the revival of said judgment in favor of his admin-*

istrators (?) and that although a judgment might, under such proceedings, have been rendered in favor of the administrators of Calloway, against the present defendant,—that the payment by him of a judgment rendered under such circumstances would not justify the defendant, nor prevent a recovery by the plaintiff in this suit.

“3. If they should believe from the evidence that the defendant, at the time of the service of the garnishment, as disclosed by the record, was not a citizen of Taliaferro county, Georgia, then he was not subject to the proceedings by garnishment disclosed by the record, and that the payment disclosed by the record would not defeat the right of the plaintiff to recover in this suit.

“4. If the jury should believe from the evidence that the present plaintiff and defendant, at the time of the service of the garnishment disclosed by the record, were resident citizens of Alabama, then the defendant was not subject to the process of garnishment therein disclosed ; and if they believe that the record shows all the proceedings had against him as garnishee, that the payment of a judgment rendered under such circumstances would not defeat a recovery by the present plaintiff in this suit.

“5. If they believe from the evidence that the defendant, as garnishee, failed to appear or answer at the court to which he was required to appear and answer, and that no order, *scire facias*, rule, or other proceedings were then had or ordered against him,—then his appearance and answer at a subsequent term were voluntary on his part ; and if he submitted to a judgment under such circumstances, and then paid the same to the parties plaintiff, such judgment and payment would not defeat plaintiff's recovery in this suit.

“6. If the jury believe that a judgment was rendered against the present defendant, and that he paid the same, as shown by the record read in evidence, that such payment will not defeat a recovery by the plaintiff in this suit.

“7. That the record read in evidence, with the statutes of Georgia, does not disclose such proceedings, judgment, and evidence of payment, as would bar the right of the present plaintiff to recover in this action, if they believe that plaintiff and defendant, at the time such proceedings were had, were citizens of Alabama.

"The court refused these charges, and then charged the jury, that although there might be irregularity in the proceedings by garnishment shown by the record, yet, if the defendant paid the judgment rendered against him in good faith, such payment would operate as a full defence to this suit, to the extent of such payment, and would to that extent bar the plaintiff's right to recover."

The plaintiff excepted to the charge given, and to the refusals to give the charges asked; and he now assigns these matters for error, together with the overruling of his demurrer to the sixth plea.

NOTE BY REPORTER.—This case was submitted at the January term, 1851, and was held under advisement until the present term. During the intermediate period, several opinions were, at different terms, pronounced; each of which was afterwards withdrawn, and a rehearing awarded. The arguments of the respective counsel have thus become too voluminous for publication, while it is almost impossible to compress them within the ordinary limits of a brief. The annexed abstracts present only the main points of the arguments, with the authorities cited.

NAT. HARRIS, GEO. W. GUNN, JAS. E. BELSER, and M. ANDREWS, for the plaintiff in error, contended,—

1. That the demurrer to the sixth plea should have been sustained, because that plea was fatally defective in not setting out the statutes of Georgia under which the judgment against Howell was rendered. The common law is presumed to exist in the different States of the Union, unless shown to have been changed by statute.—*Averett v. Thompson*, 15 Ala. 78, and numerous other decisions of this court. The process of garnishment is unknown to the common law, and dependent entirely upon statutory regulations; and the statutes, therefore, under which this proceeding was had, should have been set out, either *in extenso* or substantially, in order that the court might see that they authorized it. When a foreign judgment is pleaded as a bar to an action, it must affirmatively appear that the court by which it was rendered had jurisdiction.—*Story's Conflict of Laws*, §§ 586, 549; 1



Greenl. Ev. § 542; Blair v. Rhodes, 5 Ala. 648; Gaines v. Beirne & McMahon, 3 *ib.* 114; Puckett v. Pope, 3 *ib.* 552; Bissell v. Briggs, 9 Mass. 462; Sumner v. Parker, 7 *ib.* 79; Wales v. Willard, 2 *ib.* 120; 5 Blackf. 462; 1 Binney's R. 25; 1 Bibb's R. 262; 17 Conn. 500. No presumption can be indulged in favor of the jurisdiction of the Georgia court, because the plea does not aver that it was a court of general jurisdiction; and even that averment would not be sufficient, because the proceeding by garnishment is strictly statutory, and renders the court, *quoad hoc*, limited and special. The averment that the court had jurisdiction, is but the allegation of a legal conclusion, and amounts to nothing.

The plea is fatally defective in several other particulars, which are presented also by the charges asked, as to the validity and effect of the judgment offered in evidence, in connection with the statutes of Georgia.

2. That the several charges asked should have been given, since the judgment set up by the defendant, under the statutes read in evidence, was a mere nullity, and its payment therefore was no protection to the defendant.

The original judgment was in favor of James M. Calloway, and the execution issued on it was in favor of Malcolm Johnston and Samuel Johnston as his administrators; while the record does not show that the judgment was ever revived in their names. The execution, therefore, was wholly void. Holloway v. Johnson, 7 Ala. 660; Elliott v. Mayfield, 3 *ib.* 224; Bacon's Abr., tit. Executions, 716. The return made by the sheriff, even if the execution had been regular and valid, was not sufficient to authorize the process of garnishment.

The proceedings against the garnishee are wholly irregular and void, under the statutes of Georgia. No writ, or summons of any kind, was executed on the garnishee; and the garnishee himself, being a non-resident, was not subject to the process. As the garnishee did not appear at the term to which he was summoned, and no judgment, *scire facias*, or other order was then taken against him, his subsequent appearance and answer were purely voluntary, and he can claim no right under them. Finally, the judgment against the garnishee is rendered in favor of Malcolm Johnston and

Samuel Johnston individually, and not as administrators of said James M. Calloway.

The receipts found in the transcript, though certified by the clerk, are not a part of the record, and cannot be looked to for any purpose; and there was, therefore, no evidence of the payment of the judgment against the garnishee.—Key v. Vaughan, 15 Ala. 499; Mills & Co. v. Stewart, 12 *ib.* 90; Hodges & Puckett v. Ashurst & Sons, 2 *ib.* 301; Savage v. Benham, 11 *ib.* 50; Ice v. Manning, 3 *ib.* 121; Brown v. Hicks, 1 Pike, 232; Mayo v. Johnson, 4 *ib.* 613; 20 Pick. 345; 13 Conn. 63.

S. F. RICE and ROBERT BAUGH, *contra*, insisted,—

1. That a judgment of a superior court of Georgia, under the constitution of the United States, has the same credit, validity, and effect in Alabama, as in Georgia; and nothing can be here pleaded or replied to it, which could not be pleaded or replied to it there.—Hampton v. McConnell, 3 Wheat. 234; Mills v. Duryee, 7 Cranch, 481; 4 Phill. Ev. (ed. 1850), 100; 6 Barb. (S. C.) R. 613.

2. It is apparent from the constitution of Georgia that the superior court is a court of general civil jurisdiction, and the courts of this State will take judicial notice of the constitution of Georgia.—4 Phill. Ev. (ed. 1850), 105-6; Dozier v. Joyce, 8 Port. 312; Keith v. Estill, 9 *ib.* 669; Clarke v. Day, 2 Leigh's R. 172.

3. It is an acknowledged principle, of universal obligation, resulting from the respect and comity due from one judicial tribunal to another, that a judgment of a court of record of a sister State, in itself, is *prima facie* evidence of jurisdiction; and it is not necessary for the party pleading it to set out affirmatively in his plea the facts upon which the power and authority of the court pronouncing the judgment depend. Elliott v. Piersol, 1 Peters, 340; U. S. Bank v. Merchants' Bank of Baltimore, 7 Gill's R. 415-30, and cases there cited. When general powers over a whole subject-matter are conferred by statute on a court of general jurisdiction, although its jurisdiction over the subject-matter must appear on the face of its proceedings, every intendment will be made in favor of the regularity of its proceedings. The distinction is

between the exercise of a special authority, delegated by statute to a special and limited tribunal, and the exercise of a general authority over the subject-matter, conferred by statute upon a court of general jurisdiction.—*The State v. Lewis*, 2 Zabr. 564; *Kemp's Lessee v. Kennedy*, 5 Cranch, 173-86; *Doty v. Brown*, 4 Howard's Practice R. 429; *Scott v. Coleman*, 5 Litt. 350.

4. Whether the garnishment process was in pursuance of the statute is entirely immaterial; for, although the process may be irregular, yet, if the court had jurisdiction of the process, and rendered judgment against the defendant on personal service, the payment of the judgment is a complete defence. He was not bound to move to quash for mere irregularities, nor to reverse for errors, while the court had jurisdiction both of the person and subject-matter.—*McGill v. Bone*, 13 Sm. & Mar. 592; *Hull v. Blake*, 13 Mass. 155; 4 Cowen's R. 521; 1 Porter's R. 192; *Parmer v. Bullard*, 3 Stew. 326; *Smith v. Chapman*, 6 Port. 365; *Daniel v. Hopper*, 6 Ala. 296; *Duncan v. Wares*, 5 Stew. & P. 119; 6 Barb. (S.C.) R. 613; 6 Humph. 43; *Goodrich v. Jenkins*, 6 Ohio, 44; *Arndt v. Arndt*, 15 *ib.* 33; *Anderson v. Anderson*, 8 *ib.* 108.

GOLDTHWAITE, J.—The first question presented upon the record, is as to the sufficiency of the sixth plea.

This plea sets out a judgment against the appellant, Gunn, who was the plaintiff below, and one Jones, in favor of James M. Calloway, rendered in the Superior Court of Taliaferro county, Georgia, which court (it avers) had jurisdiction. It then avers, that the administrators of Calloway, Malcolm Johnston and Samuel Johnston, made affidavit, pursuant to the statute of the State of Georgia, of the amount of the indebtedness, &c., and at the same time gave bond and security, as required by the laws of Georgia, conditioned, &c.—the issue of the summons of garnishment, service of the same on the defendant, a judgment of condemnation on his answer, and the payment of such judgment,—all before the institution of the present action; and it also alleges, that the court rendering the judgment upon the proceedings by garnishment had jurisdiction, and that the debt condemned is the same with that sued for.

We do not understand it to be insisted that the facts alleged in the plea would not have been a full defence, if the laws of Georgia which governed the proceeding had been set out, and it had appeared from those laws that the court which rendered the judgment upon the garnishment had jurisdiction. This is, in fact, a settled question in this court.—*Mills v. Stewart*, 12 Ala. 90. The objection urged is, that the law of the State in which the proceedings were had is not set out, either literally or substantially.

It may be conceded, as a general rule, that where a party claims a right, based not upon the common law, but the law of a foreign jurisdiction, it devolves upon him to prove, as a fact, the law upon which the claim or right which he asserts depends (*Cockrell v. Gurley*, at the last term); and under the application of this principle to the rules of pleading, he would be required to set out the law or statute under which he claimed, in order that the court might see that the right claimed was in conformity to it.

This rule, however, is not of universal application, and, if it applies to foreign judgments proper, does not extend to judgments of a sister State, which by the constitution of the United States (Art. IV, § 1), requiring "full faith and credit" to be given them, are placed rather on the footing of domestic judgments, and, when duly authenticated and proved, are evidence *prima facie* of jurisdiction; so that, in pleading them, it is not necessary to set out affirmatively the facts upon which the power and authority of the court pronouncing the judgment, depends.—*Mills v. Stewart*, *supra*; *Scott v. Coleman*, 5 Litt. 350; *Bank of the United States v. Merchants' Bank at Baltimore*, 7 Gill, 415, and cases cited. We are aware that decisions are to be found recognizing a contrary doctrine, but they are founded upon the principles of the common law with reference to foreign judgments proper, and in all of them which we have found in the American courts, the effect of the constitutional clause we have referred to does not appear to have been considered. On the other hand, the cases which we have cited rest, as we think, upon sound principle, and are conclusive as to the sufficiency of the plea.

On the trial of the cause, as appears from the bill of excep-



tions, certain portions of the statutes of Georgia, which it is supposed authorized the proceeding in relation to the garnishment, were read in evidence, as well as the first section of the third article of the constitution of that State, which invested the superior courts with general and unlimited jurisdiction in all civil cases; and it is insisted, that, under these statutes, the judgment rendered upon the garnishment was void, and this question is raised by the charges asked.

The act of 23d December, 1822, (Prince's Dig. pp. 36, 37,) by its first section, authorizes the plaintiff in any suit pending, or his attorney, on making affidavit of the debt or demand supposed to be due, and that he is apprehensive of the loss of the same, or some part thereof, unless a summons of garnishment issue, to issue such summons, directed to any person supposed to be indebted to the defendant, requiring the garnishee to appear at the next term of the court, and answer to such indebtedness. The second section is in these words: "In all cases, where judgment has heretofore been obtained, or may hereafter be obtained, it shall be lawful for the plaintiff, his agent, or attorney, to issue summons of garnishment, returnable to the superior, inferior, or justice's court, as the case may be, to be directed, and requiring the garnishee to depose, in like manner as in the preceding section; *provided*, that the plaintiff, his agent, or attorney, shall, if required by the defendant, or garnishee, or by any plaintiff holding a younger judgment or execution, or his attorney, swear that he believes the sum apparently due and claimed on said judgment or execution is actually due; and *provided, further*, that the sheriff, or his deputy, or constable, shall enter on said execution that there is no property of the defendant to be found."

The last proviso to this section certainly contemplates that, before a summons of garnishment can be sued out, an execution must first issue, and be returned "no property." This is necessary to entitle the plaintiff to the remedy given by the act, which is not in conformity with the course of the common law. The rule is, that where a court of general jurisdiction has a special authority conferred upon it by statute, it is, *quoad hoc*, an inferior or limited court.—Stevens v. Wilson, 5 Har. & Johns. 130; Thatcher v. Powell, 6 Wheat. 119; Den-

ning v. Corwin, 11 Wend. 647; Smith v. Fowle, 12 *ib.* 9. In our own court, in affirmation of this principle, we have invariably held, in summary proceedings based upon a statute, that everything required by the statute essential to the exercise of the right, was necessary to the jurisdiction of the court, and must appear from its proceedings.—Bates v. P. & M. Bank, 8 Port. 99; Ford v. Bank of Mobile, 9 *ib.* 471; Andrews v. Branch Bank at Mobile, 10 Ala. 375; Levert v. P. & M. Bank, 8 Port. 104; Clements v. Branch Bank at Montgomery, 1 Ala. 50. So, in Taliaferro v. Lane, 23 Ala. 369, we held an attachment against a domestic administrator, where the affidavit of the plaintiff did not show that the intestate, at the time of his death, was a resident of the State, void, on the same ground.

In the case at bar, the statute of Georgia under which the administrators of Calloway asserted the right to proceed by garnishment, did not confer that right upon them, unless, as we have seen, an execution had been issued upon the judgment, and returned “no property.” It is not necessary by the act, that this should appear, either in the affidavit, or the summons, but it is a fact upon which the authority of the party and of the court to proceed depends; and as it is the duty of the latter to determine, whether the law in this respect had been complied with, it is necessary that the record should affirmatively show that it was done. If the court should determine the fact incorrectly, it would be error, but it would not affect the validity of the judgment. In a case like the present, whether the jurisdictional fact actually existed, cannot be collaterally inquired into, if the tribunal to whose cognizance the question is referred, determined it to exist; but if the record fails to show the fact, either actually, or by the determination of the court, then the basis on which the right to the special remedy rests is wanting, and the whole proceeding is void.

The record of the case would properly consist of the affidavit and summons, with the return of the officer, the answer of the garnishee, either incorporated into the judgment or the bill of exceptions, or identified by an entry of the court.—Saunders v. Camp, 6 Ala. 73; Jones v. Howell, 16 Ala. 695. Neither the judgment against the original debtor, nor the

execution issued upon it, is, properly speaking, any portion of the record upon the proceeding in garnishment. They are simply evidence, and, unless shown in one of the modes indicated above to have been legitimately made a part of the record, cannot be regarded as such, when they do not appear to be connected with the proceedings in any way, merely from the fact that they are certified as such by the clerk of the court.—*Bates v. P. & M. Bank, supra*; *Mills v. Stewart, supra*.

But, were we to regard the judgment against Gunn and Jones, and the execution, which is certified with the proceedings on the garnishment, as forming a portion of that record, we are still of the opinion, that they fail to show the essentials necessary to the jurisdiction of the court. The judgment against the garnishee fails to show that the action of the court was based in any respect on that execution; and in proceedings of this character, nothing is to be taken by intendment. *Per Ormond, J., in Bates v. P. & M. Bank, supra*. It cannot be regarded as evidence of the existence of the jurisdictional fact, for the reason, that it does not correspond with the judgment, which is in favor of James M. Calloway, while the execution is, in legal effect, in the name of different persons, and purports to be on a judgment recovered by them. Even were we to regard it as issued upon the judgment recovered by Calloway in the name of his administrators, the execution, without a revival of the judgment by them, would be void (*Stewart v. Nickles, 15 Ala. 225*), and could not, therefore, be regarded as a valid foundation for a right.

It not appearing from the record that an execution had issued on the judgment in favor of the creditor, we are of opinion, that the judgment against the garnishee was void for want of jurisdiction; and in arriving at this conclusion, we have not considered it necessary to refer particularly to the other portions of the laws of Georgia which the bill of exceptions shows were in evidence, for the reason, that they do not affect that part of the act of December, 1822, which we have already examined, and which, in the absence of evidence showing its repeal, must be regarded as controlling the case.

As the questions we have considered will probably be decisive of the case upon another trial, we deem it unnecessary to consider any other question.

Judgment reversed, and cause remanded.

## ROBERTS vs. HEIM.

[ACTION TO RECOVER DAMAGES FOR CAUSING ATTACHMENT AGAINST ANOTHER TO BE LEVIED ON PLAINTIFF'S GOODS.]

1. *Plea in abatement construed strictly.*—Pleas in abatement are not viewed with favor, and are construed most strongly against the pleader: the rule requires that every inference, however slight, should be repelled.
2. *Non-joinder of partner, when defendant in attachment, not pleadable in abatement.* If an attachment against one partner is levied on the goods of the partnership, and the other partner brings an action for damages against the attaching creditor, the non-joinder of the defendant in attachment is not good matter for a plea in abatement.
3. *Conclusiveness of judgment on trial of right of property.*—If the claimant recover judgment on verdict against the plaintiff in attachment, on a trial of the right of property under the statute and afterwards bring an action for damages against him, the judgment on the trial of the claim suit is conclusive on the point that the defendant in attachment had no interest in the property.
4. *Exemplary damages, when allowable.*—The law allows vindictive, or exemplary damages, whenever the trespass is committed in a rude, aggravating, or insulting manner, since malice may be inferred from these circumstances.
5. *Counsel fees, when recoverable.*—Counsel fees paid by the claimant in the suit brought to try the right of property, may be taken into consideration by the jury in assessing his damages, in a subsequent action for damages against the plaintiff in attachment.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Jacob Heim against John Roberts, to recover damages for the defendant's wrongful act in causing an attachment against Frederic Heim to be levied on plaintiff's goods, whereby plaintiff was compelled to institute an action at law for their recovery, in the prosecution of which he necessarily expended a large sum of money, and sustained great loss in his credit and business by the withdrawal of the same from his stock in trade, and was thereby prevented from making an intended increase and enlargement of his said business. The defendant pleaded in abatement, "that said attachment mentioned in said complaint, if any such was issued, was levied upon the joint property of one



Frederic Heim and said Jacob Heim, (they being partners in the boot and shoe business, and the property so levied being the partnership goods of the said Heims,) and if any damage has accrued by reason of the issuance and levy of said attachment, it has accrued as well to the said Frederic Heim as to the said Jacob Heim; and that said Frederic Heim is still alive, to-wit, at Mobile in said county; wherefore, because said Frederic is not named in said complaint and summons, said defendant prays judgment," &c. The plaintiff demurred to this plea, because, "1st, it is nowhere averred or shown in said plea that said Frederic Heim, whose non-joinder with plaintiff in this suit is insisted on in said plea, was, or is, authorized and capable in law of prosecuting the same as co-plaintiff therein"; and, "2dly, said plea admits, that the party whose non-joinder with plaintiff is thereby pleaded, is, of right and in law, incapable of prosecuting said cause of action." The court sustained the demurrer, and the defendant then pleaded not guilty.

On the trial, the plaintiff offered in evidence the record of the claim suit which he had brought against the defendant to try the right of property in the goods attached, and in which he had recovered a judgment on verdict, "as conclusive on said defendant to show that the goods so levied were not liable to the debt of the defendant in attachment, and the application of the same thereto was wrongful." This record, against the objection of the defendant, was allowed to go to the jury for this purpose, and the defendant excepted.

The plaintiff introduced as a witness one Charles Heim, who testified, that he and said Frederic Heim, the defendant in attachment, were the brothers of plaintiff, lived and worked together in the same shop with him, and were his journey-men; that they were all present in the shop when the constable came to levy the attachment; that plaintiff claimed the goods as his, and called the constable's attention to the sign over the door, with J. Heim's name upon it; that the officer took away the goods, and kept them several days, and when returned they were considerably damaged; that plaintiff lost ten or twelve days in attendance on court during the trial of the claim suit, and was compelled to deposit \$150 with the surety who signed his bond in the claim suit; that he also

lost fifteen or twenty customers by reason of the levy of the attachment, who were each worth to him from \$15 to \$20 per year ; that plaintiff had intended, before the levy of said attachment, to remove his shop from Dauphin street to a more profitable stand on Royal street, and that he was prevented from doing so by the expenses caused by the levy of the attachment and the trial of the claim suit. Other witnesses for plaintiff testified to the fact that he had deposited \$150 with the surety on his bond in the claim suit, and that he was negotiating for a house on Royal street about the time the attachment was levied. The plaintiff proved, also, by his attorney in the claim suit, that he had paid \$30 counsel fees in that case.

The defendant introduced as a witness the constable who had levied the attachment, and who testified that the goods were not detained in his custody twenty-four hours, and that they were not damaged in the slightest degree when returned to him. He then offered to prove, "that there was an indebtedness existing between him and said Frederic Heim ; that said Frederic, at the time this indebtedness accrued, owned the said shop and contents above spoken of ; that said Frederic effected a sham sale with plaintiff, who was then working with him as a journeyman, and after the sale said Frederic still kept possession of said shop in all respects as before, and was still in possession ; that said sale was made for the purpose of defeating the collection of this debt and others, and that the goods levied on were, in fact, the property of said Frederic Heim. To this evidence the plaintiff objected, and the court sustained the objection ; ruling, that the defendant could only introduce evidence in mitigation of damages, or to show that the title to the goods was in some third person other than the said Jacob or Frederic, because the record of the former trial was conclusive that the goods were not the property of the said Frederic ; and to this ruling of the court the defendant excepted."

The court charged the jury, "that they were authorized to give the plaintiff, if he was entitled to recover, exemplary or vindictive damages, provided they believed from the evidence that there were circumstances of aggravation or insult, at the instance of the defendant, attending the levy of the attach-

ment"; also, "that the plaintiff was entitled to recover, as a portion of his damages, the counsel fees paid on the trial of the claim suit, provided they were a reasonable and proper charge for the services rendered." To both of these charges the defendant excepted.

The errors assigned are, the sustaining of the demurrer to the plea in abatement, the rulings of the court on the evidence, and the charges given.

F. S. BLOUNT, for the appellant, contended,—

1. That the plea in abatement was correct and sufficient in form and substance.—1 Chitty's Pleadings, pp. 64-5; 1 Saunders' R. 291, g; Addison v. Overend, 6 Term R. 766; Sedgworth v. Overend, 7 *ib.* 279.

2. That the record of the former claim suit was not conclusive against the defendant as to the title to the goods attached, and the rulings of the court to that effect were therefore erroneous.—Marshall v. Betner, 17 Ala. 833; Haddan v. Mills, 4 C. & P. 486; Sackett & Shelton v. McCord, 23 Ala. 851, and authorities there cited on appellant's brief; Lucas v. Governor, 6 Ala. 826; 2 Stew. & P. 151; 2 Greenl. Ev. § 457.

3. That the charges of the court did not lay down the correct rule as to the measure of damages.—Sedgwick on Damages, 532, 562; Pacific Ins. Co. v. Conrad, 1 Baldwin's (Pa.) R. 138.

A. J. REQUIER, *contra*, cited the following authorities:—

1. That the demurrer to the plea in abatement was properly sustained,—1 Chitty's Pleadings, 457; Longman v. Pole, 1 Mood. & Mal. 223; Winston v. Ewing, 1 Ala. 129; Moore & Co. v. Sample, 3 *ib.* 319.

2. As to the conclusiveness of the record of the claim suit, 1 Greenl. Ev. § 531, note 2; Chamberlain v. Gaillard, 26 Ala. 504.

3. As to the right to recover exemplary damages, and counsel fees,—Mitchell v. Billingsley, 17 Ala. 394; Garrett & Hill v. Logan, 19 *ib.* 348; Tatum & Smith v. Morris, *ib.* 302; Ferguson & Scott v. Baber's Adm'rs, 24 *ib.* 402.

GOLDTHWAITE, J.—The action was for causing an attachment against Frederic Heim to be levied on the goods of the appellee. The appellant, who was the defendant below, pleaded in abatement the non-joinder of Frederic Heim; alleging, that he and the plaintiff were partners, and as such joint owners of the property levied on. Pleas of this character are not viewed with favor, and the rule requires that every inference, however slight, should be repelled. Construing it most strongly against the pleader, and in the absence of any averment to that effect, we cannot say, with certainty, that the person whose non-joinder is pleaded is not the same with the defendant in attachment; and if so, as he could not maintain this suit (*Winston v. Ewing*, 1 Ala. 129), his non-joinder could not be pleaded. It is true, if the defendant in attachment was interested as a partner with the plaintiff in the goods, that would be a bar to the action (*Winston v. Ewing*, *supra*), and could have been so pleaded; but, as it would have put an end to any action for this cause, it could not be pleaded in abatement. The demurrer, therefore, was properly sustained.

The judgment on the trial of the right of property being between the same parties, was conclusive upon every matter which must have been litigated in that action.—*Chamberlain v. Gaillard*, 26 Ala. 504. The question on such trial was, whether the goods levied on were subject to the attachment; and this necessarily involved the determination of the fact, whether the defendant in attachment had any interest in them, and was conclusive upon that point. The case of *Sackett & Shelton v. McCord*, 23 Ala. 851, is unlike this case: for there it was simply a judgment for the defendant upon verdict, and there was nothing to show that it was rendered on an issue which went to the indebtedness of the defendant at the time the attachment was sued out. *Marshall v. Betner*, 17 Ala. 832, merely decided, that a judgment in favor of the defendant in the attachment suit would not prevent the plaintiff in that action, when sued for wrongfully and vexatiously suing out the attachment, from showing the real facts, although in issue in the former suit, in order to rebut the presumption of malice, which was an issue not presented in the other action.



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As to vindictive, or exemplary damages, the law allows them, whenever the trespass is committed in a rude, aggravating, or insulting manner, as malice may be inferred from these circumstances.—*Woert v. Jenkins*, 14 John. 352; *Tift v. Culver*, 3 Hill, 180; *Anthony v. Gilbert*, 4 Blackf. 348. The charge of the court upon this point went no further than to assert the law as we have stated it.

In relation to the counsel fees paid in the claim suit, we are of opinion, that they formed a legitimate subject for the jury to take into consideration in the assessment of damages. Whenever a party is compelled, by the wrongful act of another, to have recourse to professional assistance, it is justly regarded as part of the damage occasioned by such act, and may properly be taken into consideration by the jury, in all compensatory actions.—*Seay v. Greenwood*, 21 Ala. 492; *Ferguson & Scott v. Baber's Adm'rs*, 24 Ala. 402.

Judgment affirmed.

PEACEY'S CREDITORS *vs.* PEACEY'S ADM'R.

[IN MATTER OF AN INSOLVENT ESTATE—CLAIM PRIORITIZED BY SURVIVING PARTNER.]

1. *Covenant by continuing partner to pay outstanding partnership debts.*—On the dissolution of a partnership, if the remaining partner, who takes all the goods and partnership effects, covenants to become solely responsible for the outstanding partnership debts, the covenant is not one of indemnity merely, but binds him to discharge the retiring partner within a reasonable time from all liability for the debts; and if he dies without complying with his engagement, and his estate is declared insolvent, the retiring partner has a claim against the estate to the amount of the outstanding debts.

## APPEAL from the Court of Probate of Dallas.

IN THE MATTER of the estate of George Peacey, deceased, which was declared insolvent in June, 1853, and against which the appellee (Brian Ward), who was the administrator of the estate, filed as a claim, duly verified by affidavit, a written instrument in these words:—

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"This indenture is to certify, that the copartnership heretofore existing between George Peacey and Brian Ward, under the firm of Peacey & Ward, in the mercantile business, in Selma, Alabama, was, by mutual consent, dissolved on the 2d day of July, 1852. Brian Ward withdraws from the firm; George Peacey remains, and conducts business on his own account. George Peacey, on his part, becomes solely responsible for all the debts contracted for, and remaining unpaid against, the said firm of Peacey & Ward, amounting to \$12,699 12, and hereby guaranties to B. Ward the payment of the same, releasing him from all obligations in the payment, on the condition annexed—viz., George Peacey has merchandize to the amount of \$6,184 90, and debts due the firm to the amount of \$1,097 91, and Brian Ward's note of hand for \$3,050 74, for merchandize he takes to Cahaba, and note of hand for \$855 62, for his half of losses sustained in business during the copartnership. Any error, or omission, which may have occurred, and hereafter discovered, is to be shared mutually. Given under our hands and seals, this 8th July, 1852."

(Signed and sealed by both parties, and attested by two witnesses.)

In the affidavit accompanying this claim, Ward swore that the sum of \$12,699 12, mentioned in the deed, was justly due and unpaid. The other creditors of the estate filed written objections to this claim, on the ground that it was not a just debt against said estate; and a trial was had before the court respecting its allowance. Ward introduced as a witness F. M. Blackwell, who was one of the subscribing witnesses to the deed, and who testified, "that Peacey and Ward dissolved partnership at the time, and upon the terms, stated in said agreement: that Peacey continued to do business in Selma, upon his own account, from the date of said dissolution up to the time of his death; that Ward removed to Cahaba, and there opened a store on his own account, with the goods mentioned in said agreement as taken by him to Cahaba; that Peacey and Ward afterwards proceeded to replenish their respective stocks of goods by subsequent purchases, each on his own individual account; that he (witness) afterwards purchased from said Ward the said stock of goods in his hands in Cahaba, for \$5,000, and paid him said sum, in full,

by taking up said Ward's individual notes in favor of sundry merchants in Mobile and New Orleans, which notes the witness produced and showed to the court, and all of which were Ward's individual notes. The witness stated, that he did not know what was the consideration for said notes,—that they might have been given, in part, for the paper of Peacey & Ward, and in part for merchandize; but of this he did not know." Ward then proposed to introduce as evidence certain notes, executed by Peacey & Ward, amounting to \$5,919 95, which were on file in said court as claims against the estate of said Peacey, and which were unpaid. The creditors objected to the introduction of these notes as evidence, but the court overruled their objection, and they excepted. On this evidence, the court allowed Ward's claim against the estate, to the amount of \$5,919 95; to which the other creditors excepted, and which they now assign for error.

N. H. R. DAWSON and WM. M. BYRD, for the appellant :

1. Where the remaining partner, on the dissolution of a firm, covenants to pay the partnership debts, and to indemnify the retiring partner against them, and afterwards dies without performing his covenant, whereby the retiring partner is compelled to pay a portion of said debts, the latter is a specialty creditor of the estate.—Collyer on Partnership, § 331; *Musson v. May*, 3 Vesey & B. 194; *Kerr v. Hawthorn*, 4 Yeates, 170.

2. The party's remedy is in equity, by bill for specific performance.—*Deveau v. Fowler*, 2 Paige, 400; *McGown v. Sprague*, 23 Ala. 524; *Collyer on Partnership*, § 243.

3. Where one partner sells his entire interest in the partnership effects to his copartner, who promises to pay all the debts, the latter becomes the absolute owner, discharged from the lien of the retiring partner.—*Ex parte Ruffin*, 6 Vesey, 120; *Ex parte Peele*, *ib.* 602; *Ex parte Fell*, 10 *ib.* 347; *Story on Partnership*, § 358.

4. As the estate was insolvent, Ward's claim could not be allowed until the partnership debts were fully paid.—*Smith & Co. v. Mallory's Executor*, 25 Ala. 632; 13 B. Mon. 555.

5. If the decree be correct, the amount of debts allowed against the estate is double their actual amount; the cred-

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itors' debts being about \$6,000, and Ward's claim for the same debts \$6,000 more.

W. M. MURPHY, *contra*.

GOLDTHWAITE, J.—We concede that, if the instrument on which the appellee's claim was based had been one of indemnity merely, he could have recovered nothing, unless he had proved actual loss or damage; but, on looking to the obligation, it shows that Peacey and Ward had been partners,—that the firm was dissolved, the former kept the goods, and the debts due the firm, and Ward gave him his note for one-half the losses; and for these considerations Peacey was to become “solely responsible for all the debts contracted for, and remaining unpaid against, said firm.” This was, in effect, a stipulation to discharge Ward from all responsibility for the partnership debts; and Peacey, under this obligation, was bound to do this, certainly within a reasonable time. Failing to comply with his engagement, he would have been liable, if he had lived, to an action at the suit of Ward, in which the measure of damages would have been the amount of the responsibility of Ward upon the partnership debts from which Peacey had failed to discharge him.—*Lathrop v. Atwood*, 21 Conn. 117; *Gilbert v. Wiman*, 1 Coms. 559; *Hogan v. Calvert*, 21 Ala. 194. As Peacey would have been liable to Ward, for this sum, at law, if living, his estate would be chargeable with it after his death; and all the evidence that was required to support the claim against the estate, was the obligation, and proof of the fact that Peacey had not discharged Ward from liability for the partnership debts. This last fact, as appears from the record, was established by testimony showing the existence of those debts; and the claim was, therefore, properly allowed for the amount of them.

Whether the specific debts, the failure to discharge which constituted the foundation of Ward's claims, could be allowed by the Probate Court against the estate of Peacey, in favor of the holders, is a question which the record does not present, and which it is unnecessary to discuss.

Judgment affirmed.



GARRETT'S ADM'RS *vs.* GARRETT & GARRETT.

[ASSUMPSIT FOR MONEY HAD AND RECEIVED.]

1. *When court may charge jury on evidence of single witness.*—Where the evidence of a single witness tends to prove certain facts, which present a particular phase of the case, the court may properly instruct the jury on the effect of his testimony (if believed by them), without noticing the other evidence in the cause: such a charge does not, either expressly or by implication, exclude the other evidence from the consideration of the jury; and if such an inference is apprehended, it may be guarded against by asking other instructions.
2. *When statute of frauds will not prevent recovery for money had and received under executed parol contract.*—Conceding that a purchase of lands at execution sale, under a parol agreement with the defendant in execution to purchase for his benefit, will enure to the benefit of the purchaser himself, under the operation of the statute of frauds; yet, if the purchaser re-sells the lands, taking a note for the purchase money, and places this note in the hands of a third person for the benefit of the defendant, the latter may maintain an action for money had and received, to recover its proceeds when collected, and the statute of frauds is no defence to the action.
3. *Admissions, conclusiveness of.*—Admissions, to be conclusive on the party making them, must be made under such circumstances as to amount to an estoppel *in pais*.
4. *Insolvent laws of Georgia construed, and held no defence to action for recovery of property omitted from schedule.*—Under the insolvent laws of Georgia, as shown in evidence in this case, the insolvent debtor is not divested of his title to property omitted from his schedule; and although such property may be subjected to the satisfaction of his debts, yet his debtor cannot take advantage of the omission to defeat a subsequent action for the recovery of the property.
5. *Statute of limitations begins to run at what time.*—If a surety for the defendant in execution, having control of the judgment, under an agreement to hold and use it for the defendant's benefit on his payment of it, purchases his lands at execution sale, and afterwards re-sells them, taking a note for the purchase money, which he places in the hands of a third person for the benefit of the defendant, who afterwards brings an action to recover its proceeds,—the statute of limitations does not begin to run from the payment of the judgment, but from the subsequent receipt of the money.
6. *General objection to evidence, of which part is legal.*—When a general objection is made to evidence, of which part is legal, the entire objection may be overruled.
7. *Specific objection to evidence waives other objections.*—An objection to evidence on a single specified ground is a waiver of all other objections to it.
8. *Objections to parol evidence, on the ground that it tended to vary the legal effect of a sale under execution, considered and overruled.*

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9. *Evidence held relevant and corroborative.*—Where two witnesses testify to a payment of money,—one stating that it was made before the commencement of the action, and the other not specifying the time at all, the testimony of the latter cannot be rejected as irrelevant, but must be regarded as corroborative of the former.

ERROR from the Circuit Court of Chambers.

Tried before the Hon. EZEKIEL PICKENS.

THIS action was brought by Jesse H. Garrett and Blount S. Garrett, in February, 1849, to recover a certain sum of money (say \$650) had and received by the defendant, John Garrett, for their use and benefit, under the following circumstances: In August, 1832, one Anthony Dyer recovered a judgment for about \$2,000, in the Superior Court of Upson county, Georgia, against Bacon & Peavy, and also against the plaintiffs in this suit, as their accommodation endorsers. John Garrett and one Martin W. Stamper, at the request of the said Jesse H. and Blount S. Garrett, gave their notes to Dyer for the amount due on this judgment, which notes were endorsed by the said Jesse H. and Blount S. Garrett, and Dyer transferred to them the control of the judgment; and for their further security and indemnity Jesse H. and Blount S. Garrett placed in the hands of one Joseph Sturgiss, who was the attorney of said Dyer, notes on third persons to the amount of \$1,600, with instructions to apply the proceeds, when collected, to the payment of the notes given to Dyer. At the time this arrangement was entered into, it was agreed by parol between the several parties that Stamper and John Garrett should control the judgment for the benefit of said Jesse H. and Blount S. Garrett, and after the payment by them of the debt to Dyer the balance collected on the judgment and notes was to enure to their benefit; the sole object of the transaction being to secure Stamper and John Garrett against liability on their notes. An execution, issued on this judgment, was levied in December, 1833, on a certain tract of land, as the property of Jesse H. and Blount S. Garrett; and at the execution sale Stamper became the purchaser, and credited the amount of his bid on the execution. This tract of land Stamper subsequently exchanged for another, and sold the latter tract, in 1844, to one Robert Scandrett, taking his

note for the purchase money. When this note fell due, Stamper "handed it over to John Garrett, for the benefit of Jesse H. and Blount S. Garrett"; and the money collected by John Garrett on this note, in December, 1844, is the money sued for in this action.

The declaration contained only the common money counts, and the only plea was the general issue, with leave to give any special matter in evidence.

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence the depositions of said Stamper, Sturgiss, and Scandrett, whose testimony establishes the facts above stated. In his answer to the tenth direct interrogatory, Stamper states, "that he had some houses and lots in the town of Thomaston, which he considered the property of Jesse H. and Blount Garrett after a debt was settled for which himself and John Garrett were bound; and the understanding was, that he was to sell or dispose of said property as he thought proper, and that he swapped the houses and lots in Thomaston for the lot in Stewart county sold to Scandrett." The defendant objected to this answer being read in evidence, "because the same concerns the title to real estate, of which there is better evidence"; but the court overruled his objection, and he excepted.

The answer of the witness Sturgiss to the second direct interrogatory is as follows: "The plaintiffs had been engaged in merchandize at Thomaston as partners, and were liable to Anthony Dyer, as endorsers of Bacon & Peavy, on a judgment for \$2,533 83 principal, interest to 28th August, 1832, \$134, with costs; and Dyer, by his attorney, transferred the same to Martin W. Stamper and John Garrett, who thereby obtained the control thereof, by giving their notes to Dyer, with the plaintiffs as their endorsers, for the amount of the same, or the part then unpaid, if any part of the same was paid, of which witness has no recollection. This transfer was made at Thomaston, Upson county, Georgia, on the 18th February, 1833." The defendant moved the court to exclude this answer from the jury, "because it tended to vary the terms of the sale, and the effect of the title which was made to Stamper, and the legal effect of the sale"; and, in support of his motion, read in evidence the statute of frauds of Geor-

gia, found in Prince's Digest, p. 915, § 4, and showed that, under the statutes of Georgia, the sheriff is required to make to the purchaser of lands a deed conveying all the legal and equitable interest of the defendant in execution. The plaintiffs thereupon stated, that the deposition of Sturgiss was offered in evidence in connection with the deposition of Stamper, and with certain statutes of Georgia, regulating the issue and levy of executions, and making judgments and executions transferrable by written assignment; which statutes may be found in Prince's Digest, p. 436, § 1, and p. 464, § 1. The court overruled the motion to exclude, and the defendant excepted.

The defendant then made a separate motion to exclude, for the same reason, each separate clause of each separate answer of the witnesses Sturgiss and Stamper to the direct interrogatories; but the court overruled each motion, and the defendant excepted. These answers are too long for insertion; nor, indeed, is it necessary to state them in full, since the substance of the evidence, which is above stated, presents the objections as clearly as do the entire answers.

The answer of the witness Sturgiss to the fifth direct interrogatory is as follows: "Witness cannot state whether the notes to Dyer have been fully paid off, except what he has heard from the Garretts and Stamper. Agreeably to his best recollection, he has been informed by all the parties, the Garretts and Stamper, that the notes, or the judgment obtained by Dyer on the notes, were fully paid off and discharged. Witness applied all the money he collected to the same: how much he cannot now state, as he has no full memorandum, and time has effaced it from his memory; but witness feels satisfied, the last he heard of the debt from Dyer, that *there was a balance due, which, as he subsequently learned from all the Garretts and Stamper, was fully paid.*" The defendant moved to exclude from the jury the italicized portion of this answer, "because the witness does not state at what time (whether before or since the commencement of this suit) the Dyer debt was paid off"; but the court overruled his motion, and he excepted.

The answer of the same witness to the fifth cross-interrogatory is as follows: "Witness states that the sale of the said



lots in Thomaston was before the plaintiffs filed their schedule under the insolvent debtors' act of Georgia. The house and lot was not in the schedule, and witness so advised plaintiffs, as the title was then in Stamper, the purchaser, who held the legal title for the purpose of realizing the full value thereof, to be applied to the payment of the Dyer debt. Stamper then informed the witness that the house was purchased with that view and purpose alone; and witness knows that neither he, nor Stamper, nor the defendant looked to it any further than as a trust fund, or for the creation of a trust fund, to be so applied. It was not the plaintiffs', and witness then advised them that it should not be included in their schedule. *The plaintiffs, at the time of filing their schedule, did not include any of the assets turned over to indemnify the defendant and Stamper, and witness advised them that they had no right so to do.* Witness was then satisfied, from his knowledge of the plaintiffs' affairs in these transactions, that the assignment of the assets placed with him was not intended by them to defraud any other creditor, or to conceal their effects, or to practice a fraud on their creditors in that behalf. He does not now recollect what their schedule contained." The defendant moved the court to exclude from the jury the italicized portion of this answer; but the court overruled the motion, and the defendant excepted.

The defendant offered in evidence, 1st, a transcript of the record of the Superior Court of Upson county, Georgia, showing the plaintiffs' application for the benefit of the insolvent debtors' act of Georgia, and their final discharge under the order of the court in August, 1833; 2dly, certain statutes of Georgia, which may be thus described: The insolvent debtors' act, to be found in Prince's Digest, p. 286, §§ 1 to 9; the statute of frauds, on page 915; certain statutes in relation to sales under execution, &c., on pages 431, § 43, 458, § 163, 473, § 223. The defendant read in evidence, also, the deposition of Thos. W. Goode, who testifies, that he was one of Dyer's attorneys in the suit against Bacon & Peavy and Jesse H. and Blount S. Garrett, and was instrumental in procuring Stamper and John Garrett to become liable for the debt; that the transfer of the judgment to Stamper and John Garrett was absolute; that he afterwards brought suit, as attor-

ney for Dyer, and recovered judgment, on the notes given by Stamper and defendant; and that defendant paid him \$400 on this judgment. The defendant offered evidence, also, of admissions made by Blount Garrett, in the presence of Jesse Garrett, at a settlement had between Blount and John Garrett in the fall of 1848, to the effect that he had no claims against said John Garrett. There was some other evidence in the case, but it is immaterial.

The court charged the jury as follows:

"1. That if they believed from the evidence that the money sued for arose from any contract for lands, or any interest in lands, then, unless there was written evidence which bound the defendant to pay it, they must find for the defendant; but if the money sued for arose in the way stated by the witness Stamper, then the statute of frauds would be no defence.

"2. That mere admissions, of one or both of the plaintiffs, do not bar this action, if the jury believe from all the evidence taken together, including the admissions, that the defendant, at the commencement of this suit, was justly indebted to the plaintiffs, and has never paid."

The defendant excepted to each of these charges, and then asked the court to instruct the jury, "That if they believe from the evidence that plaintiffs are suing for money which arises on a note on Robert Scandrett, given for the price of a lot of land sold to him by M. W. Stamper; that the title was in Stamper at the time the lot was sold; and that plaintiffs had no right to it, except by virtue of a parol agreement with Stamper and defendant, that they should have it after the debt to Dyer was paid off,—then they must find for the defendant." This charge the court gave, and then added, "But, if they believed the testimony of the witness Stamper, then the statute of frauds was no defence, and, so far as it was concerned, their verdict should be for the plaintiffs, for the price of the land, with interest from the time the defendant received the money"; and to this qualification of the charge the defendant excepted.

The defendant then asked this further charge, "That if plaintiffs applied for the benefit of the insolvent laws of Georgia, and obtained a discharge as shown by the evidence, and the money now sued for arises from the sale of property which

they had placed in the hands of the defendant, or of the defendant and Stamper, a few months before their application was made, and said funds were placed in his or their hands to pay the Dyer debt, and then to pay the balance to the plaintiffs,—then they must find for the defendant.” The court refused this charge, and the defendant excepted.

The defendant then asked this further charge, “That if this arrangement was made in the year 1833, and the Dyer debt has been paid off more than six years before the commencement of this action, and the defendant has been a resident citizen of this State since 1835,—then they must find for the defendant.” The court gave this charge, and then added, “But, if the money was not received by the defendant until 1844 or 1845, as shown by the witness Stamper, the action would not be barred”; and to this qualification the defendant excepted.

The errors now assigned embrace all the rulings of the court on the evidence, the charges given, and the refusals to charge as requested.

WHITE & PARSONS, for the plaintiffs in error :

1. The first charge by the court, as it stands, is erroneous ; but the first branch of it is correct.—*Larkins v. Rhodes*, 5 Porter, 195; *Pitts v. Waugh*, 4 Mass. 424; *Smith v. Burnham*, 3 Sumner's R. 435; *Lamar v. Bailey*, 2 Vermont R. 627; *Parker v. Bodley*, 4 Bibb's R. 102; *Patterson v. Ware*, 10 Ala. 444; *Rowland v. Boyer*, 10 *ib.* 690. But the qualification to this charge, and more particularly the qualification added to the first charge asked by the defendant, as to Stamper's testimony, is erroneous. It is objectionable as a charge on a part of the evidence only, which necessarily excluded from the jury the consideration of the other evidence in the case ; because it invaded the province of the jury ; and because it assumed that there was no conflict in the evidence as to the facts to which Stamper testified.—*Lewis v. The State*, 21 Ala. 218; *Holmes v. The State*, 23 *ib.* 17; *Dill v. The State*, 25 *ib.* 15; *Carlisle v. Hill*, 16 *ib.* 407; *Clemens v. Loggins*, 1 *ib.* 623; *Browning & Co. v. Grady*, 10 *ib.* 999; *Boyd & Macon v. McIvor*, 11 *ib.* 822.

2. In this action, both the plaintiffs must recover, or neither

can; and the right of either to recover may be defeated by proof of admissions, as well as in any other way. The second charge, therefore, was erroneous.—Cochran & Estill v. Cunningham's Executor, 16 Ala. 448; Hardeman v. Sims, 3 *ib.* 747.

3. The money sued for is the proceeds of the house and lot in Thomaston, which the plaintiffs failed to include in their schedule when they applied for the benefit of the insolvent debtors' act. The statutes of Georgia, which were read in evidence, show that the mere omission to include the property in the schedule is a violation of the law, which works a forfeiture of the omitted property,—one half to the informer, and the other half to the trustee or creditors. The plaintiffs' failure to include this property certainly affords no ground for their recovery of the money. They are attempting to practice a fraud on their creditors; and the law will not interfere to help them, the contract being executed, and the parties *in pari delicto*.—Black v. Oliver, 1 Ala. 449; Boyd v. Barclay, *ib.* 36; Collins v. Blantern, 2 Wils. 347. The charge asked on this point, therefore, should have been given.

4. The plaintiffs' right of action (if any they have) accrued when the debt to Dyer was paid; and no matter how many different changes the property may have passed through since that time, the statute of limitations begins to run from that date. The defendant was a resident of this State for many years, and there is no proof that he received the money under any other agreement than that made by him and Stamper when they assumed the Dyer debt. No other promise is shown, and Stamper's conclusions cannot be regarded.—Kavenagh v. Weedon, 1 Ala. 231; Johnson v. Johnson, 5 *ib.* 90; Wood v. Wood, 3 *ib.* 756; Maury v. Mason, 8 Porter, 211.

S. F. RICE, with whom was R. MITCHELL, *contra* :

1. Where one person receives a conveyance of any description of property, upon a verbal agreement that he will transfer or dispose of it, absolutely or conditionally, for the benefit of another, he is bound to perform his engagement. If he refuses to perform it, a court of equity will compel him to do so; and if he performs it, and the execution of the trust creates a mere moneyed demand, and he receives a sum certain, **the person for whom he received it may maintain an action for**



its recovery, and the statute of frauds is no defence to the action.—Hitchcock v. Lukens, 8 Porter, 333; Sledge v. Clifton, 6 Ala. 600; Turner v. Eldridge, 11 *ib.* 1049; Cameron v. Clarke, *ib.* 259; Strickland v. Burns, 14 *ib.* 511; McLeod v. Powe & Smith, 12 *ib.* 9; 7 Barb. (S. C.) R. 63.

2. The recovery in this case is justified by the principle, that where one man has money in his hands, which *ex æquo et bono* belongs to another, the person entitled to the money may maintain assumpsit for it, if there is no contract modifying or controlling the general liability to pay.—Hitchcock v. Lukens, *supra*.

3. The defendant in this case, having received the money sued for, in 1844-5, for the plaintiffs, as proved by Stamper and others, will not be permitted to shelter himself from his liability to pay it over, by invoking the aid of the statute of frauds of Georgia, nor by the effort to avail himself of the proceedings under the insolvent laws of Georgia, nor by his appeal to the courts of Alabama to vindicate the public policy of Georgia, and to make the penal statutes and public policy of Georgia operative in Alabama as rules and elements of judicial decision. He is not in a fit condition to raise these questions, or to receive any benefit from them. He received the money for the plaintiffs below, and has no right to retain it. No person claims it, except the plaintiffs; and if he pays it to them, he is discharged, so far as it is concerned, from all liability to any other person. To permit him, under such circumstances, to retain it for his own use, would be a reproach to the courts of justice.—Upchurch v. Norsworthy, 15 Ala. 705; Hitchcock v. U. S. Bank, 7 *ib.* 386; Boyd v. Barclay, 1 *ib.* 34.

4. The statute of limitations, under the proof, could not commence running in the defendant's favor, until he received the money; and this occurred within less than six years before the commencement of the suit. The payment of the original debt to Dyer would not, of itself, entitle the plaintiffs to maintain this action, unless the defendant had then received the money.

5. The property, from which the money now in controversy arose, was not included in the schedule filed by the plaintiffs when they applied for the benefit of the insolvent debtors'

act of Georgia. There is no outstanding title to this money in another, and the proceedings under the insolvent laws have nothing to do with the case. But, even if there was an outstanding title to the money in another, yet the defendant could not avail himself of it as a defence to the action, because he received the money for the plaintiffs; and as no one has given him notice of any claim upon it, and he is not in any way connected with the outstanding title, a payment by him to the plaintiffs would protect him from all liability to the owner of such outstanding title. He is the agent of the plaintiffs, as to this money, and received it as their agent; he is, therefore, estopped from setting up such defences, even if they were true in point of fact.—Crutchfield v. Wood, 16 Ala. 703; Johnson v. Goodridge, 15 Maine R. 29.

6. There was no error in charging upon the effect of Stamper's evidence, if believed by the jury. It is the right and duty of the court to put every phase of the case to the jury; otherwise, trial by jury, in many cases, would be a mockery. The defendant had the right, if he apprehended erroneous inferences on the part of the jury, to ask other instructions. *Faires v. Lodanc*, 10 Ala. 50.

GOLDTHWAITE, J.—On the trial below, the evidence tended to establish the following facts: The plaintiffs, J. H. & B. S. Garrett, were indebted to one Dyer, by judgment, for upwards of two thousand dollars; and at their request, the defendant, John Garrett, and one Stamper, gave their notes to Dyer, endorsed by the plaintiffs, for the amount, and, to secure themselves, took control of the judgment, and received from the plaintiffs some sixteen hundred dollars in notes on other persons. It was agreed, by parol, between the parties, that Stamper and the defendant were to control the judgment and the notes, so as to secure themselves against the note given by them to Dyer; and if the plaintiffs paid this debt, they were to receive the benefit of the amount which was collected on the judgment and the notes received from them. Under this arrangement, an execution was issued upon the judgment, which was levied on a tract of land; and this land, Stamper, who was examined as a witness, swears, was bought by him at the sale, and the amount credited on the

execution. This tract, he also swears, was exchanged by him for another tract, which he sold, taking a note for the purchase money, and this note he turned over to the defendant, for the benefit of the plaintiffs; and he also swears, that he was informed by him that he had collected the money upon it.

The statute of frauds of Georgia, in which State the arrangement was made, was offered in evidence; and its terms are substantially the same with our own.

There was other testimony introduced, but it is unnecessary to state any portion of it in connection with the question presented by the first charge, which was, in effect, that the statute would be no defence, if the jury believed the facts stated by the witness Stamper, in relation to the purchase and sale of the land, the turning over of the note received by him for the purchase money to the defendant for the benefit of the plaintiffs, and the collection of the note by him.

It is supposed by the counsel for the plaintiff in error, that this charge was erroneous, for the reason, that it rested the case solely upon the testimony of the one witness referred to, instead of the whole evidence. But such is not its effect. There was nothing in the charge, which excluded, either expressly or impliedly, any of the other evidence in the cause; and had it been apprehended that any such inference could have been drawn from it, the defendant could have been protected by asking the necessary instructions from the court. It cannot be doubted, that the judge may instruct the jury as to the law in the different phases in which the case may be presented upon the evidence; and if the evidence of one witness tends to prove certain facts, there can be no error in declaring the law upon these facts; and this was all that was done in the charge referred to. The question of law which it involves, is simply as to the application of the statute of frauds to the facts as stated by the witness Stamper.

Upon the evidence of this witness, the defendant must be regarded as occupying the position of surety for the plaintiffs; and conceding that any agreement with them, not in writing, to buy lands under execution and pay the proceeds to them, upon a re-sale, would be within the statute, yet, if lands were actually bought under such an agreement, and resold, and the money paid to a third person for the benefit of

the party with whom the agreement was made, there could, we apprehend, be no question as to his right to recover it. It would be money had and received to his use. The case we have put, is identical, in principle, with the one before us, in the aspect in which we are considering it. If the contract was void as to the lands, by force of the statute, then Stamper was not bound by it. He had the right to make the purchase, and when made, it would enure to his own benefit. He considered, however, that as the plaintiffs had paid the debt on which he was their surety, they were entitled to the proceeds of the land, and accordingly turned over the note which he received on the re-sale to the defendant for the benefit of the plaintiffs. This he had a perfect right to do, and the defendant could not gainsay the appropriation.

What we have said disposes of the first and third charges.

The second charge, when taken in connection with the evidence, simply asserted the legal proposition, that admissions made by plaintiffs were not conclusive upon them, unless they were made under such circumstances as to amount to an estoppel *in pais*, which the testimony shows was not the case; and in that there was no error.

In relation to the charge which was predicated upon the insolvent laws of Georgia, and the failure of the defendants in error to insert in their schedule their interest in the proceeds of the land, it is only necessary to observe, that if the contract was void, they had no interest whatever in such proceeds. But, independently of this ground, it is to be remarked, that there is nothing in the laws referred to, as given in evidence, upon the trial, which divests the insolvent of his ownership in the property omitted. He may be convicted of perjury for falsely taking the oath which the statute prescribes, or the property may be subjected to the satisfaction of his debts; but there is no principle upon which his debtor could take advantage of the fraudulent omission on his part to insert in his schedule the demand sued for, by way of defence to such action.

So, also, in relation to the charge which was requested, to the effect that the plaintiffs could not recover if the arrangement between them on the one part, and the defendant and Stamper on the other, was made in the year 1833, and the



debt to Dyer paid off more than six years before the commencement of the present action. If the plaintiffs were entitled to recover at all, it could only be upon the ground, that the defendant had received money to which they were entitled ; and the statute could not begin to run, until the cause of action accrued, which could not be until the money was received.

There was no error in overruling the answer of the witness Stamper to the tenth direct interrogatory, since, in no aspect in which it could be considered, did it involve the question of title to real estate. If, however, it was conceded that it did, as so much of the answer as states the understanding or agreement between the parties, and what disposition the witness made of the property, was admissible, the court was not bound to sustain an objection which went to the whole answer, only part of it being illegal.

As to the exception taken by the appellant to the admission of the answer of the witness Sturgiss to the second direct interrogatory : This answer disclosed that the plaintiffs below had been engaged as partners in Georgia, and had become liable to one Dyer upon a note which was in judgment ; that Dyer transferred the same to Stamper and John Garrett, in consideration of their note, endorsed by the plaintiffs ; and it was also in evidence, that Stamper bid off certain lands of the plaintiffs, at an execution sale on the judgment. The answer was objected to, solely on the ground that it tended to vary the terms of the sale, and the effect of the title of the witness Stamper ; and this, consequently, operated as a waiver of every other objection.—*Creagh v. Savage*, 9 Ala. 959. Under this rule, however objectionable the answer may have been in other respects, we are unable to perceive how it tended to change the effect of the sale under execution, and the purchase by Stamper ; the more especially as it was offered in connection with the law of Georgia, where the assignment was made, which recognized its validity, and authorized the collection of the judgment by the assignee. The same principle applies to the objections which were made to the other answers of this witness upon the same ground. There is nothing in any of them, which tends to vary the legal effect of the sale to Stamper. Conceding that the agreement be-

tween the plaintiffs on the one part, and Stamper and the defendant on the other, so far as the same relates to the purchase of lands under the execution, may have been within the statute of frauds ; yet Stamper had the right to purchase, and to pay the money resulting from a re-sale of the lands to the plaintiffs ; and if he paid it to the defendant, for their benefit, they could, as we have seen, recover it from him, and the statute of frauds would not prevent it.

What we have said in relation to the objections made to the testimony of the witness Sturgiss, applies equally to those which were made upon the same ground to the evidence of the other witness.

In relation to the motion to exclude the portion of the answer of Sturgiss to the fifth direct interrogatory, to the effect that the debt of Dyer had been paid, for the reason that it did not show that the payment was made before the commencement of the action,—there was no error, because the evidence of the witness Stamper tended to show that such was the case. Here were, then, two testifying as to the payment of the same debt,—one locating the payment at a period before the commencement of the suit, the other not locating it at all. As there was but one payment, the testimony referred to of the last witness must be regarded as corroborative of the evidence of the first as to the payment, and in this aspect it was properly admitted.

As to the objection taken to that portion of the answer of the witness Sturgiss to the fifth cross-interrogatory, which stated that the plaintiffs, at the time of filing their schedule, “ did not include any of the assets turned over to indemnify the defendant and Stamper, and witness advised them that they had no right so to do,”—it is certain that the defendant had not the right to object to the first part of it, as it was in direct response to the question propounded by the objector ; and a part being admissible, under the influence of the principle we have so frequently asserted, it was no error to overrule an objection which went to the whole.

We have gone through all the points made upon the record, and we have only to add that the judgment must be affirmed.

RICE, J., having been of counsel, not sitting.

## DUNHAM vs. ROBERTS.

[APPLICATION BY WIDOW FOR LETTERS OF ADMINISTRATION ON ESTATE OF HER DECEASED HUSBAND.]

1. *Widow's right to administer.*—A widow is entitled to administer on the estate of her deceased husband, if, being competent in law, she makes application within forty days after his death is known, unless she relinquishes her right in one of the modes specified in the statute (Code, §§ 1662, 1674) : a recital in an order of court, granting letters of administration to other persons, that it is “made known to the court, by A. B., special attorney of said widow, that she relinquishes her right of administration to the applicants”, does not debar her from applying for letters before the expiration of the forty days.
2. *Conclusiveness of order granting letters of administration.*—A grant of letters of administration to a third person, on an *ex parte* application, does not preclude the widow from asserting her right by petition to the court, asking the revocation of the former letters, and the grant of letters to herself. The provisions of the Code (§ 1696), specifying the causes for which an administrator may be removed, do not apply to such a case.

## APPEAL from the Court of Probate of Pickens.

IN THE MATTER of the estate of W. C. Dunham, deceased.

The record discloses the following facts : At a regular term of the court, held on the 13th March, 1854, “came Alexander B. Clitherall and Andrew J. Roberts, and moved the court to appoint them administrators on the estate of said W. C. Dunham, deceased, and that they give separate bonds in equal amount ; and it being made known to the court, by the said Alex. B. Clitherall, special attorney of Melissa C. Dunham, that the said Melissa, widow of the said deceased, relinquishes to said applicants her claims of the said administration, and no person else objecting thereto, it is ordered,” &c., that said Clitherall and Roberts be appointed administrators of said estate, upon their entering into bond with good security. Thereupon said administrators filed their bonds, which were approved by the court, and entered on the discharge of their duties.

On the 30th March, 1854, Clitherall filed his written resignation of his office as administrator, which was accepted

by the court; and on the same day Mrs. Melissa C. Dunham, the widow and relict of the deceased, filed her written petition in the court, asking the removal of Roberts from the administration, and the grant of letters of administration to herself. Her petition states, that said W. C. Dunham died, on or about the 21st day of February, 1854, in the State of New York, intestate, and leaving personal property in said county of Pickens, which was his domicile; that the petitioner is his widow, is a resident of said county, is of lawful age, is fully competent to discharge the duties of administratrix of her said husband's estate, and has never relinquished her right to the administration as required by the statute; that letters of administration on said estate were granted by said court, on the 13th March, 1854, to said Clitherall and Roberts, as appears by the records of said court to which reference is prayed, but petitioner is advised that their appointment was null and void, and that she is by law entitled to the administration, and is ready to give bond as by law required; and that Clitherall has resigned his said office. The prayer of the petition is, that the letters of administration granted to Roberts may be revoked and set aside, and that letters of administration may be granted to the petitioner, because, 1st, "she is the widow of the decedent, fully competent, legally qualified, and by law entitled to administer on his estate"; 2dly, "said Roberts was illegally appointed, and not entitled by law to said administration"; 3dly, "said Roberts has not given such bond as is by law required"; 4thly, "said appointment was *coram non judice*, illegal, and void, and there were no proceedings in writing in said court, nor any written application on the part of said Roberts made or filed"; and, 5thly, "the death of said W. C. Dunham was not here known, nor to the widow, until about the 23d of February last, and forty days have not elapsed since his death was here known."

Roberts, being duly notified of the filing of this petition, appeared in court, by his attorney, on the 4th May, 1854, and filed his demurrer to the petition, assigning as grounds of demurrer, 1st, "that the petition shows that letters of administration have been granted by this court, at a previous term thereof, to Alexander B. Clitherall and this defendant,



and does not allege any of the causes on account of which this court is authorized to revoke the same"; 2dly, "that said petition does not show that the petitioner is one of the parties or persons authorized by law to ask a revocation of letters of administration"; and, 3dly, "that said petition shows that the whole matter incorporated therein has been previously adjudicated in this court, and between the same parties, and cannot be reviewed and reversed by this court."

The court sustained the demurrer, and dismissed the petition; and its ruling is now assigned for error.

WATTS, JUDGE & JACKSON assigned errors for the appellant, and submitted the case without brief or argument.

No counsel appeared for the appellee.

CHILTON, C. J.—Conceding the facts stated in the petition to be true, as we must upon the trial of its legal sufficiency on demurrer, we think the court erred in dismissing it.

The Code gives the right to administer, first, to the widow, "if she is willing to accept, and fit to serve."—§ 1668. She did not relinquish by failing to apply within forty days after the death of her husband was known (§ 1669); nor did she relinquish, or renounce, as provided in section 1662, for, in such case, the record must show either that she appeared before the judge of probate and declared her renunciation, or that she "renounced the appointment in writing, under her hand, attested by a judge of probate, judge of the circuit or supreme court, or chancellor." Her petition, then, clearly shows that she was entitled to the administration, to the exclusion of the present incumbent.

It would seem by the objections to the petition specified in the demurrer, that the appellee supposed the court had no power to set aside its previous grant of letters to him, unless upon an allegation of some of the grounds specified in chap. 4, title 4, part 2 of the Code, pages 342-5. But this application is predicated upon the fact, that the previous proceeding being *ex parte*, and the petitioner not being before the court, her rights are not to be concluded by the adjudication; and she has the right, therefore, to propound her interest or

title, and to pray the court to open the previous appointment, to adjudicate upon her claims to the office, and to appoint her, if she has not lost her right by reason of some of the causes mentioned in the Code. If the court refuse to grant her rights, she has her remedy by appeal from its judgment. See, as to the power of the Probate Court to set aside the previous order made without notice, *Roy v. Segrist*, 19 Ala. 813, and cases there cited; *Bradley v. Andress*, at present term.

The judge should have heard the application, and, if sustained, should have set aside the previous order, and granted letters of administration to the petitioner.

Judgment reversed, and cause remanded.

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### WILEY vs. WILEY.

[BILL FOR DIVORCE ON GROUND OF VOLUNTARY ABANDONMENT.]

1. *Bill may be filed in county of defendant's residence.*—Held, on the authority of *Reese v. Reese*, 23 Ala. 785, that the bill in this case was improperly dismissed by the chancellor, on the ground that it could not be filed in the county of the defendant's residence.
2. *Remendment of cause on reversal of decree.*—Where a bill for divorce is dismissed by the chancellor for want of jurisdiction, and his decree is reversed on error, the cause will be remanded to the primary court, although the evidence shows that the complainant is entitled to a decree, when it may become necessary to make some provision for the wife, or some order in relation to her separate estate, which the appellate court cannot make.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Thomas H. Wiley, the appellant, who alleged in his bill that he was a resident citizen of Dallas county; asking a divorce from his wife Ruthy, on the ground of her voluntary abandonment of his bed and board, and residing separate and apart from him in Perry county. On final hearing, the chancellor dismissed the bill for want of

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jurisdiction, holding that it ought to have been filed in the county in which the complainant resided ; and his decree is now assigned for error.

JOSEPH R. JOHN, for the appellant.

GOLDTHWAITE, J.—The case of *Reese v. Reese*, 23 Ala. 785, is conclusive to show that the chancellor erred in dismissing the bill, on the ground that it was filed in the county of the residence of the defendant below ; and as the allegations are sufficient, in themselves, to entitle the complainant to the relief prayed, and are fully proved, a divorce should have been decreed. As, however, it may become the duty of the chancellor to make provision for the wife under the statute (Clay's Dig. 170, § 8), or to make some order in relation to the separate estate of the wife, which this court is unable to make, we will reverse the decree, and remand the cause, that in addition to the divorce such other decree may be rendered as may be proper under the circumstances.

The decree must be reversed, and the cause remanded ; but the appellant must pay the costs of the appeal.





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## ACTION.

1. *Single cause of action cannot be split up into several.*—A single cause of action cannot be split up into several; and the rule applies as well when the entire cause of action cannot, as when it can be recovered in the first action.—*Firemen's Ins. Co v. Cochran & Co.*..... 228
2. *Injury to dog actionable.*—A dog is a species of property, for an injury to which an action at law may be maintained; and it is not necessary to show that he had pecuniary value.—*Parker v. Mise.*..... 480
3. *Distinction between detinue and trespass or trover in splitting single cause of action.*—Trespass, trover, or detinue, at the election of the party injured, may sometimes be maintained for the same wrongful act to several specific chattels. If he elects to proceed in trespass or trover, he is bound to regard the act as indivisible, and cannot afterwards split it up into several causes of action; but if he elects to bring detinue, he may maintain a separate action for the detention of each chattel.—*Wittick v. Traun.*..... 562
4. *Civil action merged in felony.*—An action to recover damages for killing a slave cannot be maintained until there has been a prosecution for the felony; and the complaint, therefore, must aver such prosecution.—*Morton v. Bradley.*..... 640

## ADVERSE POSSESSION.

1. *No adverse possession against United States.*—Adverse possession cannot be set up to defeat or avoid a patent from the United States government, since there can be no adverse possession against the government itself.—*Iverson & Robinson v. Dubose.*..... 418
2. *Purchaser of land in possession of third person affected with notice.* Where one purchases land in the possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights binding on his vendor.—*Garrett v. Lyle.* 586

## AGENCY.

1. *Agent may sue in his own name, on note given for money of principal lent by him without authority, and payable to himself as agent.* If an agent lends the money of his principal without authority, and takes a promissory note for it payable to himself as agent, he may main-

## AGENCY—CONTINUED.

- tain an action on the note in his own name, unless it is shown that he has been in some way discharged from the liability thus incurred.—*Bryan et al. v. Wilson*..... 208
2. *Notice to agent is notice to principal*.—If notice, actual or implied, is brought home to an agent or attorney, it is immaterial whether the principal had personal knowledge of the fact; since the principal is presumed, both at law and in equity, to know whatever his agent knows. *Wiley, Banks & Co. v. Knight*..... 336
3. *Agent's authority to accept must be averred*.—In declaring against the principal, on a bill accepted by his agent, the agent's authority to accept must be averred; it is not sufficient to allege, that he was the agent, and as such agent accepted for the principal.—*May v. Kelly & Frazier* ..... 497
4. *Captain of steamboat cannot bind owner by individual acceptance*. The acceptance of a bill of exchange by the captain and master of a steamboat, in his own name as captain, does not bind the owner as acceptor ..... 497
5. *Extent of agent's authority, and liability of principal for his unauthorized act*.—The delivery of an account to an agent, for the purpose of collecting it, confers no authority to settle it in any other mode; and if the agent exceeds his authority, although the principal may ratify the act, yet, to avoid it, he is not obliged to give notice that he repudiates it.—*Dowell's Adm'r v. Henry*..... 612
6. Every one who deals with an agent is bound, at his peril, to ascertain the extent of his authority..... 612

## AMENDMENTS.

1. *Amendment of declaration not revisable on error*.—The amendment of the declaration after issue joined, but before the cause is submitted to the jury, is discretionary with the primary court, and consequently not revisable on error.—*Goldsmith, Forcheimer & Co. v. Picard*..... 142
2. *Provisions of Code allowing amendments as to parties do not apply to actions pending when it took effect*.—The provisions of the Code allowing amendments as to parties (§ 2403) cannot be applied to suits which were pending when it took effect—to-wit, on the 17th January, 1853; and under the old law, where one of several co-plaintiffs was dead at the commencement of the suit, there was no authority for dropping his name at any subsequent stage of the proceedings.—*Crump et al. v. Wallace*..... 277
3. *Sole plaintiff's name cannot be stricken out and that of another substituted*.—Under the statute authorizing amendments of the complaint (Code, § 2403) "by striking out or adding new parties plaintiff, or by striking out or adding new parties defendant," the court cannot allow the name of a sole plaintiff to be stricken out and that of another person to be substituted.—*Leaird v. Moore*..... 326
4. *But error in amendment may be waived*.—If, however, the defendant pleads to the amended or substituted complaint, without objecting to the leave to amend, or to the amendment itself, he thereby waives his right to review on error the action of the court in allowing it.—*Bryan v. Wilson* ..... 280

AMENDMENTS—CONTINUED.

5. *Fi. fa. on void delivery bond amendable*.—A *fi. fa.*, issued on a void delivery bond against the defendants in the judgment and their surety on the bond, if it correctly describes the judgment, by its date, amount, and names of parties, is neither void nor voidable as to the defendants in the judgment, but may be amended by striking out the name of their surety on the bond,—*DeLoach v. The State Bank*. . . . . 437
6. *Amendment of complaint*.—When the wife improperly sues in her own name for the recovery of her separate property, the complaint cannot be amended by striking out her name and inserting that of her husband. *Friend v. Oliver*. . . . . 532
7. *Amendment of complaint*.—When suit is brought in the name of a firm, on an open account for goods sold and delivered, if the evidence shows that a party not joined was a partner in the firm at the time the account was contracted, the complaint may be amended (Code, § 2403) by adding his name.—*Godbold v. Blair & Co.* . . . . . 592

APPEALS.

1. *Acknowledgment of security for costs held sufficient*.—Security for the costs of the appeal, though given by only one of the appellants, is as good as if given by all, since it covers all the costs of the appeal; therefore an acknowledgment of security “for the costs of an appeal by all the plaintiffs except R.”, is sufficient.—*Crump et al. v. Wallace*. . . . 277
2. *Code (§ 2132) does not apply to appeals*.—Section 2132 of the Code, which provides that infants must sue by their next friend, and be defended by a guardian to be appointed by the court, has reference only to suits in the common-law courts of original jurisdiction, and does not apply to appeals, which must, therefore, be governed by the rules of the common law.—*Cook v. Adams*. . . . . 294
3. *Appeal by infant must be sued out by guardian or next friend*.—When the appellant is an infant, the appeal must be sued out by his guardian, or next friend, who may either give bond to supersede the judgment, or security for the costs of the appeal; and where (as in this case) the appeal is sued out by the infant in his own name, and errors are assigned by attorney, on the fact of such infancy being brought to the knowledge of the court by affidavits, the appeal will be dismissed on motion. . . . . 294
4. *Sufficiency and approval of appeal bond*.—When an appeal is taken from a decree of the probate court, under section 1888 of the Code, a simple acknowledgment in writing is sufficient security for the costs; and if an appeal bond is taken, which describes the decree with sufficient certainty, and which is shown by the judge’s certificate to have been approved by him at the time the appeal was taken, this is a substantial compliance with the law. *Williams v. McCord*. . . . . 572
5. *Costs allowable if certificate prima facie shows jurisdiction*.—Where the certificate of the clerk, appended to the transcript, *prima facie* gives the appellate court jurisdiction of the case, costs are allowable, although the case is finally stricken from the docket for want of jurisdiction.—*Carey v. McDougald’s Adm’r*. . . . . 616
6. *Security for costs held insufficient*.—An obligation, on the part of

## APPEALS—CONTINUED.

the appellant's surety, to pay the costs of the appeal "*if the judgment is affirmed*", is not a compliance with the statute.—Code, § 3041.—  
Hinson v. Preslor..... 643

## ARBITRATION AND AWARD.

1. *Jurisdiction of equity to enforce specific performance of awards.*—Although equity will not compel the specific performance of an award, when the damages resulting from the failure to perform are capable of being exactly measured, and complete redress afforded at law; yet it is not enough to bar the interference of equity, that the party may successfully maintain an action at law upon the award—he must be able to obtain by a verdict all that it was the object of the award to give him. Kirksey v. Fike..... 383
2. *Bill sustained to enforce specific performance of award.*—Bill filed by partner against his co-partner in a tannery; alleging arbitration and award of partnership transactions, and insolvency of defendant; and asking an injunction, attachment, account, discovery and general relief. By terms of award, as alleged, partnership accounts, leather and skins on hand, and use of vats, were to be equally divided between the parties: *Held*, that the bill might be sustained, independent of the defendant's insolvency, for the purpose of enforcing the specific performance of the award, since a court of law could not afford full redress..... 383

## ASSUMPSIT.

See TROVER AND CONVERSION, 3.

## ATTACHMENTS.

1. *Damages for suing out attachment.*—One of the natural consequences of suing out an attachment against a merchant, on the ground of fraud, would be to injuriously affect his credit and business; such injuries, therefore, may be averred in the declaration.—Goldsmith, Forcheimer & Co. v. Picard..... 142
2. *Clerk of City Court has no power to issue original attachments.*—Although the City Court of Mobile is by statute vested with all the powers of the several Circuit Courts, except as to actions to try titles to land, yet there is no statute conferring authority on its clerk to issue original attachments, which, being a summary remedy in derogation of the common law, must be specially conferred by statute, or it does not exist; and therefore, where there is a judgment by default, in a suit commenced in that court by such original attachment issued by its clerk, the whole proceeding will be quashed on error.—Stevenson v. O'Hara, 362
3. *Garnishee must answer as to present indebtedness.*—Under the Code (§ 2517) a garnishee is required to answer as to his indebtedness, not only at the time of the service of the summons, but also at the time of making his answer, and whether he will not be indebted in future by a contract then existing; and judgment must be rendered (§ 2541) for the admitted indebtedness.—Central Plank-Road Co. v. Sammons & Dotes..... 380
4. *Toll-gate keeper may be garnisheed.*—Process of garnishment lies against the keeper of a toll-gate belonging to an incorporated plank-road company, to subject the money in his hands as the property of the company. 380



## ATTACHMENTS—CONTINUED.

5. *Act of 1846 giving attachments in chancery.*—A bill cannot be sustained under the act of February 5, 1846, "providing for attachments in chancery", when there is no allegation of indebtedness to any specific amount, and no affidavit that any particular sum is due.—*Kirksey v. Fike* ..... 383
6. *Drawee, before acceptance, liable to garnishment.*—A bill of exchange, until accepted, does not operate as an assignment of the funds in the hands of the drawee, which may therefore be attached by process of garnishment. (Expressly overruling *Connoley v. Cheesborough*, 21 Ala. 166; though the decision, under the facts, might have rested on its authority.)—*Sands & Co. v. Matthews, Finley & Co.* ..... 399
7. *Garnishees discharged on answer.*—Garnishees answered, that the defendant in attachment, being indebted to their firm in the sum of \$2,000, agreed to serve them as bookkeeper for the year, at a salary of \$1,500, payable monthly; that he was to receive in money only enough to pay the necessary expenses of his family, and the balance of his salary was to be applied to the liquidation of his said debt; and that they had paid him about \$500, which was a reasonable sum, for his family expenses: *Held*, that no judgment could be rendered against the garnishees on this answer, either under the Code (§ 2517) or under the act of 1854 (Acts 1853-4, p. 26, § 4).—*Hall v. Magee & Reid* ..... 414
8. *Georgia statute of garnishment construed.*—The effect of the last proviso to the second section of the Georgia statute of the 23d December, 1822, (Prince's Digest, p. 37,) is to require the issue of an execution, and a return of "no property found," before process of garnishment can issue to enforce satisfaction of the judgment.—*Gunn v. Howell* ..... 663
9. *Of what record in garnishment case consists.*—Where process of garnishment is sued out under this statute, to enforce satisfaction of a judgment, the record of the garnishment case consists only of the affidavit and summons, the return of the officer, the answer of the garnishee, and the judgment thereon rendered against him; but neither the judgment against the original debtor, nor the execution thereon issued, constitutes any portion of the record of the garnishment suit, unless incorporated into the judgment against the garnishee, or made part of the record by bill of exceptions. .... 663
10. *Non-joinder of partner, when defendant in attachment, not pleadable in abatement.*—If an attachment against one partner is levied on the goods of the partnership, and the other partner brings an action for damages against the attaching creditor, the non-joinder of the defendant in attachment is not good matter for a plea in abatement.—*Roberts v. Heim*. 678

## ATTORNMENr.

1. *Attornment of tenant does not destroy landlord's possession.*—Attornment to a stranger, by the tenant in possession, does not, of itself, destroy or affect the possession of his landlord.—*Doe ex dem. Kennedy's Heirs v. Reynolds* ..... 364

## BAIL.

1. *Re-arrest of defendant for same offence no discharge of bail.*—After the defendant has been arrested on a criminal charge, and has given bail for his appearance at court, the magistrate has no authority, on the supposi-

## BAIL—CONTINUED.

- tion that his bail are insufficient, to cause him to be re-arrested for the same offence ; such irregular re-arrest, therefore, is no discharge of his bail.—*Ingram et al. v. The State*..... 17
2. *Nor subsequent arrest on another charge, nor delivery by another State on requisition of governor.*—The subsequent arrest of the defendant on another charge; or his delivery (after escaping from his bail) by the authorities of another State on the requisition of the governor, when the demand does not seem to be predicated on the same charge, does not discharge his bail ; their remedy in such case, *it seems*, is by application for *habeas corpus*..... 17
3. *Duress of imprisonment of principal discharges bail.*—To *scire facias* on forfeited recognizance, it is a good plea by the sureties, that their principal, at the time of its execution, “was illegally and by force imprisoned and restrained of his liberty, and that under such illegal and forcible imprisonment and restraint of his liberty, and to procure a release and discharge from such forcible and illegal imprisonment and restraint of his liberty, defendants made and subscribed said writing.”—*The State v. Brantley*..... 44

## BANKS.

1. *Construction of acts for liquidation of Planters and Merchants' Bank of Mobile.* A judgment obtained in the name of the Planters and Merchants' Bank of Mobile before the surrender of its charter, and afterwards sold by its trustees under the act of 1850, is not rendered dormant by the operation of the several acts for the liquidation of the Bank, nor is the purchaser required to revive it by *scire facias*.—*DeVendell v. Doe ex dem. Hamilton*. 156

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Negotiable note of debtor, taken at or after creation of the debt, not per se payment.* The taking of a debtor's negotiable note, at or after the creation of the debt, is not a payment or extinguishment of the debt itself, unless there is an agreement so to receive it : in the absence of any such agreement, if the note is not paid at maturity, the creditor may sue on the original cause of action ; and if he produces the note at the trial, and offers to give it up to the defendant, and the evidence shows that it was taken “for the purpose of closing the account on the books”, it is not error to instruct the jury that “the taking of the note does not raise the presumption of payment.”—*Mooring et al. v. Mobile Marine Dock and Mutual Ins. Co.*..... 254
2. *Discharge of note by subsequent parol agreement.*—A parol agreement between vendor and vendee, made on discovering that the vendor had no title to a portion of the land conveyed, to the effect that the vendee should be discharged from the payment of the balance due on the note, unless the vendor made him a good title to that portion of the land within a reasonable time, is valid, and constitutes a good defence to an action on the note to recover the balance.—*Hussey v. Roquemore*.... 281
3. *Acceptance of bill of exchange must be in writing.*—Under the provisions of the Code (§§ 1532, 1535), no right can accrue to any one from a verbal promise to pay or accept a bill of exchange, unless the party to whom such promise is made negotiates the bill on the faith of it.—*Sands & Co v. Matthews, Finley & Co.*..... 399

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

4. *Retention of bill by permission no acceptance.*—If the drawee, by permission of the payee's agent, retain the bill for examination from Saturday until the following Monday, no legal obligation is thereby created against him as acceptor during that time (Code. § 1536)..... 399
5. *Drawee, before acceptance, liable to garnishment.*—A bill of exchange, until accepted, does not operate as an assignment of the funds in the hands of the drawee, which may therefore be attached by process of garnishment. (Expressly overruling *Connoley v. Cheesborough*, 21 Ala. 166; though the decision, under the facts, might have been rested on its authority..... 399
6. *Drawee only can accept, except for honor.*—Where a bill of exchange is directed to a particular person, nobody but the person to whom it is directed can accept it, except for honor; and therefore, in declaring against one as acceptor, a count is demurrable, which alleges that the bill was payable at a particular counting-house, but does not aver that it was directed in blank, or that it was drawn upon the defendant, or that he accepted it for honor, or that he resided or did business at said counting-house.—*May v. Kelly & Frazier*. .... 497
7. *Agent's authority to accept must be averred.*—In declaring against the principal, on a bill accepted by his agent, the agent's authority to accept must be averred; it is not sufficient to allege, that he was the agent, and as such agent accepted for the principal. .... 497
8. *Captain of steamboat cannot bind owner by individual acceptance.*—The acceptance of a bill of exchange by the captain and master of a steamboat in his own name as captain, does not bind the owner as acceptor. .... 497
9. *Bill not admissible under common counts, unless proved.*—A bill of exchange is not admissible evidence under the common counts, unless its execution is proved.—*May & Bell v. Miller & Co.*..... 515
10. *Drawer's name must be inserted or subscribed.*—To hold one liable as the drawer of a bill, his name must be either inserted in it or subscribed to it. .... 515
11. *Negotiable note does not extinguish rent.*—The negotiable note of the lessee, for the amount of the rent, is not an extinguishment of the rent reserved by the lease.—*Dorrance v. Jones* ..... 630

BONDS AND COVENANTS.

1. *Covenant cannot be varied by parol.*—The legal effect of a covenant cannot be varied by a parol contemporaneous agreement; as where a vendee, with covenants of warranty, agrees by parol to pay an outstanding incumbrance.—*Holley v. Younge*. .... 204
2. *Fraud, when good defence at law against deed.*—The only fraud which can be set up at law to avoid the operation of a sealed instrument, is that which goes to its execution: fraudulent misrepresentations, on the part of the vendee, to the effect that he would not use the deed against his covenantor, are no defence at law. .... 204
3. *Bond of indemnity to procure levy of void execution, itself void.*—A bond of indemnity given to induce a sheriff to levy a void execution, is itself void, and cannot be enforced by suit.—*Collier's Adm'r v. Windham*. .... 291
4. *Negotiable note does not extinguish rent.*—The negotiable note of the lessee, for the amount of the rent, is not an extinguishment of the rent reserved by the lease.—*Dorrance v. Jones*. .... 630

## BONDS AND COVENANTS—CONTINUED.

5. *Covenant by continuing partner to pay outstanding partnership debts.*—On the dissolution of a partnership, if the remaining partner, who takes all the goods and partnership effects, covenants to become solely responsible for the outstanding partnership debts, the covenant is not one of indemnity merely, but binds him to discharge the retiring partner within a reasonable time from all liability for the debts; and if he dies without complying with his engagement, and his estate is declared insolvent, the retiring partner has a claim against the estate to the amount of the outstanding debts.—*Peacey's Creditors v. Peacey's Adm'r.* 683

## CHANCERY.

1. *Riparian proprietor may enjoin in equity without first establishing his right at law.*—Equity will entertain a bill for injunction by a riparian proprietor, whose title is clear, to restrain a diversion of the water from his mill, without requiring him first to establish his right at law, or to allege that he has been in possession of the land for three years: such a bill may well be supported on the ground that complainant cannot obtain full reparation in an action at law for damages, and, further, because the injury may involve the necessity of a multiplicity of suits. *Burden v. Stein.* . . . . . 104
2. *Laches does not affect plaintiff's right to enjoin.*—In cases where the plaintiff's right is not clear until established at law, equity will refuse to enjoin, if it is shown that he has been guilty of any improper delay in applying to the court; but this principle has no application, where his right is clear, and of such a character as entitles him to ask the interference of the court without resorting to law in the first instance. . . . 104
3. *Jurisdiction of equity when remedy at law is adequate, specific, and perfect.*—A bill in chancery, filed by an administrator, or other trustee, to enforce the collection of a purely legal demand, for which his remedy at law is adequate, specific, and perfect—seeking no discovery, account, recovery of specific choses in action, or particular trust fund—is without equity: the mere fact that the proceeds of the demand, when collected, will be trust property, does not give equity jurisdiction.—*Kimball v. Moody.* 131
4. *When wife may come into equity to protect her separate estate.*—Although the husband, as trustee of his wife, having reduced her separate property into possession, may interpose a claim at law, when it is levied on, and try the right of property; yet the wife cannot compel him to do so, and may therefore at once apply to a court of equity for the protection of her rights.—*Gerald and Wife v. McKenzie.* . . . . . 166
5. *Specific execution of contract.*—In the exercise of a sound discretion, equity will refuse to enforce the specific execution of a contract in favor of one party, when it is uncertain whether he can fulfil the stipulations of the contract on his own part; as where (in this case) complainant's insolvency rendered it doubtful whether he would be able to pay his share of the purchase money yet due, or to repay the advances made by defendant.—*Sims v. McEwen's Adm'r.* . . . . . 184
6. *Matters dehors the contract.*—If a party seeks the specific execution of a contract in equity, he cannot have relief for matters which are not embraced in the contract. . . . . 184
7. *Compensation incidental to relief in absence of special equity.*—If the plaintiff does not make out a case which entitles him to a decree for specific per-



## CHANCERY—CONTINUED.

- formance, compensation for damages resulting from a breach of the contract, or for services performed under it for which he may recover at law, will not be decreed him, unless some special equity intervenes. 184
8. *Equity will not establish void nuncupative will on ground of ignorance or mistake of law.*—A nuncupative will bequeathing personal property of more than five hundred dollars in value, which is void under the Code (§ 1615), cannot be established in equity, on the ground of the decedent's ignorance or mistake as to the change in the law in this respect made by the Code.—*Erwin et al. v. Hamner*. . . . . 296
9. *Distinction between opening an account and surcharging and falsifying it.*—When an account is opened on the ground of fraud, the whole of it may be unraveled; but where permission is merely given to surcharge and falsify, the account stands as *prima facie* correct, and the *onus* of proving mistakes is on the party alleging them; and therefore, where a bill is filed to impeach a decree on the ground of fraud, if the answer denies all fraud, but admits an error or mistake, the complainant cannot have a decree unless he amends his bill.—*Cowan and Wife v. Jones*. . . . . 317
10. *Amount too small to uphold jurisdiction of equity.*—The defendant in this case admitted in his answer that a balance of \$8 42 was due from him to complainants, but the bill was not sustained as to any of the other matters in controversy: *Held*, that this sum, of itself, was too small to justify a resort to equity, or to uphold its jurisdiction. . . . . 317
11. *When equity will control mortgage whose mortgage becomes oppressive.*—The principle that equity will control the action of a mortgagee, whose mortgage becomes oppressive to a third party, applies only to mortgages fairly made, and not to such as operate in the nature of assignments by insolvent debtors of all their property.—*Wiley, Banks & Co. v. Knight*. . . . . 336
12. *Jurisdiction of equity to enforce specific performance of awards.*—Although equity will not compel the specific performance of an award, when the damages resulting from the failure to perform are capable of being exactly measured, and complete redress afforded at law; yet it is not enough to bar the interference of equity, that the party may successfully maintain an action at law upon the award—he must be able to obtain by a verdict all that it was the object of the award to give him. *Kirksey v. Fike*. . . . . 383
13. *Bill sustained to enforce specific performance of award.*—Bill filed by partner against his co-partner in a tannery; alleging arbitration and award of partnership transactions, and insolvency of defendant; and asking an injunction, attachment, account, discovery and general relief. By terms of award, as alleged, partnership accounts, leather and skins on hand, and use of vats, were to be equally divided between the parties: *Held*, that the bill might be sustained, independent of the defendant's insolvency, for the purpose of enforcing the specific performance of the award, since a court of law could not afford full redress. . . . . 383
14. *Act of 1846, giving attachments in chancery.*—A bill cannot be sustained under the act of February 5, 1846, "providing for attachments in chancery", when there is no allegation of indebtedness to any specific amount, and no affidavit that any particular sum is due. . . . . 383
15. *Jurisdiction of chancellor, pending appeal from final decree granting divorce a vinculo, to allow temporary alimony.*—On bill filed by the wife, asking a di-

## CHANCERY—CONTINUED.

- voiced *a vinculo*, an interlocutory order was made for the allowance of temporary alimony, and on final hearing a decree was rendered in her favor: a reference to the master was also made, to ascertain and report the value of the defendant's estate, and it was further ordered that the cause "be retained in court for further orders"; and from this decree, before the report came in, the defendant took an appeal: *Held*, that the chancellor, notwithstanding the suing out and pendency of the appeal, had jurisdiction to grant an order, on the petition of the wife showing a necessity for it, to secure the prompt payment of the quarterly allowances made by the previous interlocutory decree, and to require the defendant to pay the complainant's solicitors such further sum as might be a reasonable compensation for their services in defending the appeal.—*Ex parte King*. . . . . 387
16. *For what causes equity will dissolve partnership*.—A court of equity may decree the dissolution of a partnership during the term for which it was entered into, and declare it void *ab initio*, where there is fraud, imposition, misrepresentation, or oppression in the original agreement; and may also decree a dissolution for causes arising subsequently to its formation, founded upon the misconduct, fraud, or violation of duty by one partner, or on account of his inability or incapacity to perform his obligations, and to contribute his skill, labor, and diligence in the promotion and accomplishment of the objects of the partnership, or for the existence of an impracticability in the undertaking for which the partnership was formed.—*Fogg & Vanderslice v. Johnston*. . . . . 432
17. *When demand for unliquidated damages against insolvent estate of assignor may be set off in equity against assignee*.—A demand for unliquidated damages, arising from a breach of covenant of title, may be set off in equity against a note founded on an independent consideration, when the vendor is dead and his estate insolvent; but to make it available as an equitable set-off against an assignee of the note, it must be shown to have accrued before notice of the assignment.—*Wray's Adm'rs v. Furniss*. . . . . 471
18. *Abatement of obstruction refused, because complainant had resorted to unfair means to compel travel through private way to his ferry*.—H., being the owner of a ferry across the Chattahoochee river, and having opened a private way leading from his ferry into the public road on this side of the river, filed a bill against A. to abate an obstruction erected across said road. A. answered, averring that H. 'had' previously obstructed the public road on the Georgia side of the river, so as to divert public travel from defendant's ferry to his own, and that the obstruction complained of had straightened the public road, placed it on better ground, and been accepted by the overseer of the road: *Held*, that the injunction was properly dissolved on the allegations of the answer.—*Hill v. Averett*. . . . . 484
19. *When equality is equity*.—When parties stand in *equali jure*, with reference to liabilities arising *ex contractu*, equality of burthen becomes equity. *Crayton v. Johnson*. . . . . 503
20. *How this equity may be destroyed*.—But, although parties are equally bound to bear the burthen of any loss which may accrue from their joint contract, this equality may be destroyed by the act of one party in superinducing the loss, or by their subsequent contract. . . . . 503
21. *Jurisdiction of equity where remedy at law is plain, adequate, and complete*.

## CHANCERY—CONTINUED.

- A party cannot come into equity to enjoin an action at law for contribution, when his bill shows that he has a plain, adequate, and complete remedy at law, and he does not ask a discovery. . . . . 503
22. *When distinct cross demands may be set off in equity.*—The mere existence of mutual and independent demands does not authorize the interposition of equity to set them off against each other; but, to warrant the interference of equity, there must be circumstances from which it can be inferred that one debt was contracted on the faith of the other, or that there was an agreement between the parties that the one should be discounted from the other, or there must be some other intervening equity which renders the interposition of that court necessary for the protection of the demand sought to be set off.—*Simmons v. Williams*. . . . . 507
23. *Demand due to administrator cannot be set off in equity against his individual debt.*—An administrator *de bonis non* having recovered a decree, on final settlement, against the administrator in chief, the money was collected under execution against the surety on the latter's official bond; and the decree having been afterwards reversed on error, the surety sued at law to recover the money: *Held*, that the defendant could not enjoin the judgment at law, by alleging that he had paid over the money to the distributees of the estate, some of whom were insolvent and non-resident; that he had subsequently recovered another decree against the principal administrator, on which execution had been issued and returned 'no property'; and that the surety had been indemnified by his principal. . . . . 507
24. *Fraudulent contract cannot be established in equity.*—Equity will not interfere to declare a contract, which is on its face an absolute sale, to be a trust or mortgage, when the evidence shows that the transaction was intended to defraud the vendor's creditors. *In pari delicto, potior est conditio possidentis.*—*Brantley v. West*. . . . . 542
25. *Sufficiency of parol evidence to convert written contract of sale into trust or mortgage.*—Where a party seeks relief in equity in the face of a written instrument, asking that an absolute sale may be held a trust or mortgage, he must establish his case by clear and convincing proof. It is not sufficient to raise a doubt, or suspicion, whether the writing expresses the true contract of the parties; nor is proof by several witnesses of defendant's subsequent declarations, which are not charged in the bill, sufficient to outweigh the positive denial of his answer under oath, the writing itself, and the testimony of the subscribing witness. . . . . 542
26. *Jurisdiction, where remedy at law is plain, adequate, and complete.* If the owner of slaves allows them to go into the possession of an intended purchaser, under an executory contract of sale, which does not pass the legal title, he may recover them by action of detinue; but whether he proceeds for the slaves themselves, or for their agreed price, his remedy is at law, and he cannot come into equity.—*Love v. Crook*. 624

## CLERKS.

1. *Clerk of City Court has no power to issue original attachments.*—Although the City Court of Mobile is by statute vested with all the powers of the several Circuit Courts, except as to actions to try titles to land, yet there is no statute conferring authority on its clerk to is-

## CLERKS—CONTINUED.

sue original attachments, which, being a summary remedy in derogation of the common law, must be specially conferred by statute, or it does not exist; and therefore, where there is a judgment by default, in a suit commenced in that court by such original attachment issued by its clerk, the whole proceeding will be quashed on error.—*Stevenson v. O'Hara* ..... 362

## CODE, CONSTRUCTION OF.

1. Section 3254, concerning *lotteries*, construed in *Salomon v. The State*. 27
2. Sections 397, 398, 399, 1057, 1058, and 1060, concerning *retailing*, construed in *Long v. The State* ..... 32  
*Maxwell v. The State* ..... 660
3. Section 3243, concerning *gaming*, construed in *Brown v. The State*.. 47  
*Dale and Underwood v. The State*..... 31
4. Section 3283, concerning *selling spirituous liquors to slaves*, construed in *Powell v. The State* ..... 51
5. Section 2313, allowing plaintiff to *establish the correctness of his demand by his own oath*, construed in *Jordan v. Owen*..... 152
6. Section 2131, authorizing the wife to sue alone when the suit relates to her separate estate, held applicable only to separate estates created by statute.—*Gerald and Wife v. McKenzie* ..... 166  
*Also, Friend v. Oliver* ..... 532
7. Section 2240, as to meaning of "*demands not sounding in damages merely*", construed in *Holley v. Younge*..... 204
8. *Provisions of Code affecting testimony do not apply to causes pending when it took effect*.—The effect of the exception contained in section 12 is, to exempt causes pending when the Code went into operation—to-wit, January 17, 1853—from the operation of its provisions affecting testimony; therefore, in such a case, the transferor of the instrument sued on, though declared by section 2290 an incompetent witness for his transferee, may still be rendered competent by a release.—*Hiscox v. Hendree*..... 216
9. *Provisions of Code allowing amendments as to parties do not apply to actions pending when it took effect*.—The provisions of the Code allowing amendments as to parties (§ 2403) cannot be applied to suits which were pending when it took effect—to-wit, on the 17th January, 1853; and under the old law, where one of several co-plaintiffs was dead at the commencement of the suit, there was no authority for dropping his name at any subsequent stage of the proceedings.—*Crump et al. v. Wallace* ..... 277
10. *Section 2132 does not apply to appeals*.—Section 2132 of the Code, which provides that infants may sue by their next friend, and be defended by a guardian to be appointed by the court, has reference only to suits in the common-law courts of original jurisdiction, and does not apply to appeals, which must, therefore, be governed by the rules of the common law.—*Cook v. Adams* ..... 294
11. Section 2403, authorizing *amendments*, construed in *Leaird v. Moore* 326  
*Godbold v. Blair & Co.* ..... 592  
*Friend v. Oliver* ..... 532  
*Bryan v. Wilson* ..... 208



## CODE, CONSTRUCTION OF—CONTINUED.

12. *Rules of practice and evidence prescribed by Code do not apply to suits pending when it took effect.*—The rules of practice and evidence prescribed by the Code, by force of the exception contained in section 12, do not apply to suits pending when it went into operation—to-wit, on the 17th January, 1853; and the provision of section 2211, which gives the defendant in real actions a right to demand an abstract of the plaintiff's title, is one of these rules.—*Doe ex dem. Kennedy's Heirs v. Reynolds* ..... 364
13. Section 1536, making a retention of bill of exchange equivalent to acceptance, construed in *Sands & Co. v. Matthews, Finley & Co.* ..... 399
14. Section 1696, specifying causes for which administrator may be removed, construed in *Dunham v. Roberts* ..... 701

## CONTRACTS.

1. *Difference between contracts of insurer and carrier.*—The contract of the insurer is not necessarily co-extensive with that of the carrier by whom the goods are transported, and it is therefore erroneous to hold him liable until the goods are delivered to the consignee, or to some one for him, or are landed at the place where it is usual for him to receive goods. The carrier, by the terms of his contract, or by force of a custom, may be liable for the overland transportation of the goods, after they shall have been landed at the accustomed port of destination, to the place where the consignee usually receives goods, or until delivered to him; while the risk of a marine policy is at end, in the absence of express stipulations to the contrary, whenever the goods can be considered safely landed according to the usual course of business, at the accustomed port of destination, although they may never have been delivered to the consignee.—*Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son* ..... 77
2. *Policy held a severable contract.*—A policy of insurance upon 198 bales of cotton, valued at \$9,900, at a premium of three-sixteenths, is so far a severable contract, that the underwriters are discharged from liability for whatever portion is safely landed at the port of destination. . . 77
3. *Specific performance refused on account of complainant's insolvency.* In the exercise of a sound discretion, equity will refuse to enforce the specific execution of a contract in favor of one party, when it is uncertain whether he can fulfil the stipulations of the contract on his own part; as where (in this case) complainant's insolvency rendered it doubtful whether he would be able to pay his share of the purchase money yet due, or to repay the advances made by defendant.—*Sims v. McEwen's Adm'r* ..... 184
4. *Services performed under void (because parol) contract recoverable at law.*—Although an action at law cannot be maintained for the breach of a contract which is void under the statute of frauds because not reduced to writing, yet a recovery at law may be had for services performed under it. .... 184
5. *Validity of contract determined by what law.*—The validity of a contract must be determined by the statute in force at the time it is made: if it is valid when made, a subsequent change or repeal of the law cannot impair its validity; and if it is void when made, no subsequent law can impart to it validity.—*Mays, adm'r, &c., v. Williams* ..... 267

## CONTRACTS—CONTINUED.

6. *Estoppel cannot arise from promise made on Sunday.*—A promise made on Sunday to pay the balance due on a promissory note, against which the promisor has a valid defence, even if made under circumstances which ordinarily would estop him from setting up that defence, is void under the statute, and has no binding effect.—*Hussey v. Roquemore* ..... 281
7. *Promise to make deed not performed by tender of another's deed.*—If the vendor, on discovering that he has no title to a portion of the land, promise to "make a valid deed" thereto, the vendee is not bound to accept the deed of a stranger, which, though it conveyed a good title, might yet involve the trouble and expense of an inquiry to ascertain its validity: he has a right to stand on the terms of his contract ..... 281
8. *What is reasonable time.*—A promise made on the 8th December, 1849, to make titles "within a short time" thereafter, is not complied with by tendering a deed "after the 13th October, 1851," and after the vendee had abandoned the land. .... 281
9. *Principal and surety.*—*New contract between surety and creditor.*—If the surety on a note, given for the purchase money of a slave, executes his own note to the payee "in discharge of the balance remaining due", and takes up the original note, his position as surety is exchanged for that of creditor; he becomes the principal in his new note, and cannot defeat a recovery on it, by setting up fraud in the sale of the negro, or a breach of the warranty of soundness.—*Fluker v. Henry's Adm'r.* ..... 403
10. *Notes executed on same day not necessarily parts of same transaction.*—Notes given for the purchase money of distinct tracts of land, but bearing date and executed on the same day, do not thereby become parts of the same transaction, nor so blended together that an eviction from one of the tracts will enable the vendee to enjoin the collection of the note given for the other.—*Wray's Adm'r v. Furniss* ..... 471
11. *What conduct amounts to a breach of contract on part of owner or his agent.*—If a guardian hires out his ward's slaves, and afterwards deprives the hirer of their services during the term by harboring them when run away, he is guilty of a breach of contract; but to make him responsible for the act of his ward in harboring the slave, he must be in some way connected with it, and it must be shown to have been done by his directions, or with his assent: it is not sufficient to show that he had previously allowed his ward to make contracts in relation to his own property, and had refused to entertain a proposition to rescind the contract until he had consulted his ward.—*Camp v. Dill* ..... 553
12. *Consolidation of separate and distinct contracts.*—If two slaves are put up separately at public auction to be hired, and knocked off to the same bidder, who was induced by the representations of the owner to bid for each under the expectation that he would get both, and a single note given for the amount of their hire, the two contracts are not thereby so consolidated that a breach of one would warrant a rescission of both. 553
13. *Rescission of contract by hirer.*—The charges in this case, tested by the principles laid down at a former term (22 Ala. 249), held correct. .... 553
14. *Recoupment of damages on breach of contract.*—Plaintiffs contracted to deliver to defendant, who was a grocer, a certain quantity of Cincinnati hams, at a stipulated price per pound; to be delivered during the season as defendant might want them, and to be paid for on delivery. Af-

## CONTRACTS—CONTINUED.

- ter the delivery of a part of the specified quantity, the price of hams rose, and plaintiffs became unable to complete their contract; and defendant having refused to pay for those already delivered, they brought suit for the price: *Held*, that defendant, if he then knew that plaintiffs were unable to complete their contract, might refuse to pay, and might recoup his damages.—*Robertson v. Davenport & Patterson*. . . . . 574
15. *Executory contract of sale construed*.—Articles of agreement, bipartite, whereby the party of the first part "doth hereby agree to bargain, sell, and convey," unto the party of the second part, certain slaves, in consideration that the party of the second part "hereby delivers to the said" party of the first part, "by order, all his right, title, and interest, both in law and equity, to the sum of \$2,000", part of an amount just recovered from the United States by an agent of the party of the second part; and conditioned, that if the said party of the second part "will, by any means, with or without suit, either in law or equity, enable the said" party of the first part "to recover said sum of \$2,000, with lawful interest," from said agent, then the said party of the first part "binds himself, his heirs, executors, &c., that the above bill of sale shall be absolute, and shall convey unto him, his heirs, executors, &c., all right, title, and interest in said slaves; otherwise, to be void and of no effect,"—*held* neither a mortgage, nor an absolute sale, but an agreement to sell, which did not, *per se*, pass the legal title to the slaves.—*Love v. Crook et al.* . . . . . 624
16. *Conditional sale construed*.—A written contract for the sale of several slaves, at a specified price for each, which uses present words of conveyance, and contains the additional stipulations, that two of the slaves are to remain in the possession of the vendor until the first day of January next thereafter, and that he "may redeem any and all the said negroes, at the valuation hereinbefore affixed to them, within twelve months",—is not a mortgage, but a conditional sale, with a reservation of the right to re-purchase.—*Murphy v. Barefield*. . . . . 634
17. *Validity of subsequent contract between parties having conflicting claims to mortgaged property*.—Persons who have conflicting claims to slaves previously conveyed by mortgage or conditional sale, to which they were not parties, may by subsequent contract settle and adjust their rights to the property: and such subsequent contract itself, irrespective of the character of the former contract, must be considered as the ascertainment and adjustment between themselves of their rights. . . . . 634
18. *Subsequent contract construed*.—If, by such subsequent contract, after reciting the previous contract and the conflicting claims which have arisen to the property, it is stipulated and agreed that one of the two negroes shall remain in the possession of each party "until the sums for which they were respectively mortgaged be fully paid" unto the party of the second part, who claims to be the assignee of the original mortgagee, or purchaser: the party of the first part "relinquishing all further right", and the party of the second part "obligating himself to convey to her perfect and complete titles whenever said sums respectively are paid",—the transaction is not on its face a mortgage, and does not authorize a court of equity to grant any relief to either party founded on it. 634

## CORPORATIONS.

1. *By-law imposing discretionary fine within fixed limits not void.*—A by-law of a municipal corporation, within the powers granted by its charter, is not rendered void for uncertainty, because the amount of the penalty imposed for its violation is left discretionary, within fixed limits, (*e. g.* "not exceeding fifty dollars,") with the municipal court. (*Overruling Mayor and Aldermen of Mobile v. Yuille*, 3 Ala. 137, as to third head-note.)—*Mayor and Aldermen of Huntsville v. Phelps* ..... 55
2. *By-law imposing unequal tax for maintenance of public burial grounds and burial of paupers, declared void.*—It is the duty of a municipal corporation to maintain public burial grounds and to bury paupers, and the expense attendant on the discharge of this duty should in justice be apportioned among all the corporators; therefore a by-law, declaring that the city sexton, whose fees are paid out of the estates of the persons whom he buries, "shall expend, under the supervision of the committee on public grounds, five hundred dollars on the public burial grounds, and bury the paupers free of charge," is unreasonable, unjust, and void.—*Beroujohn et al. v. Mayor and Aldermen of Mobile* ..... 58
3. *Stockholder in private corporation not competent witness for it.*—The members or stockholders in a corporation, created for private emolument, are not competent witnesses for the company; and where the charter provides that the directors "shall be owners of stock", proof that the witness is a director, unexplained and uncontradicted by other evidence, is sufficient to exclude him.—*M. & W. Plank-Road Co. v. Webb*. 618

## COSTS.

1. *Bill for divorce.*—The bill having been dismissed, and a divorce refused, on the ground that both parties were in fault, the costs were equally divided.—*David v. David* ..... 222
2. *Bill for rescission of contract.*—The bill in this case having been dismissed on account of a variance between the allegations and proof, the costs were imposed on the complainant, because he had manifested a desire by no means commendable to get rid of his bargain, when only a small portion of the land, of which he retained undisturbed possession, had (through mistake) been omitted from his conveyance, and his vendor was solvent.—*Williams v. Sturdevant* ..... 598
3. *Appeals.*—Where the certificate of the clerk, appended to the transcript, *prima facie* gives the appellate court jurisdiction of the case, costs are allowable, although the case is finally stricken from the docket for want of jurisdiction.—*Carey v. McDougald's Adm'r* ..... 616
4. *Trial of issue at law by order of chancery.*—Where the verdict is in favor of the will, and the court trying the issue erroneously renders judgment for the costs against the heir, besides certifying the costs to the chancellor, by whom also they are decreed against the heir, the error is without injury.—*Dabbs v. Dabbs* ..... 646

## COURT AND JURY.

1. *Charge making conviction depend on proof of agency alone, erroneous.*—A charge which instructs the jury, that the case for the State is made out by proof that "the defendant is the agent" of the persons carrying on any lottery not authorized by our statute laws, is erroneous, because it relieves the State from proving that the defendant, within one year



COURT AND JURY—CONTINUED.

- before the finding of the indictment, and within the county in which it was preferred, had done an act which amounts to a violation of the statute.—*Salomon v. The State*..... 26
2. *Conspiracy—Liability of each for act of others.—Whether act was done in prosecution of common purpose, is a question for the jury, and charge excluding it is erroneous.*—If several persons conspire to do an unlawful act, all are responsible for the acts of each, if done in prosecution of their common purpose; but if an offence is committed by any one of them, from causes having no connection with the common object, he alone is responsible for its consequences. In such cases, it is a question for the jury, whether the act was done in prosecution of the original unlawful purpose, or was independent of it and without previous concert; and a charge which excludes this question from their consideration, is erroneous.—*Frank et al. (slaves) v. The State*..... 37
3. *Charge dispensing with proof of venue, erroneous.*—Where the evidence, as set out in the bill of exceptions, did not show that the venue was proved; and “upon this state of facts, the court charged the jury, that if they believed the evidence, they must find the defendant guilty:” *Held*, that the charge was erroneous, because it authorized the jury to find the defendant guilty without any proof that the offence was committed in the county in which the indictment was preferred; and for this error the judgment of conviction was reversed, and the cause remanded.—*Brown v. The State*..... 47
4. *Charge referring question of law to jury, erroneous.*—A charge, the effect of which is to refer to the jury the decision of a question of law—*e. g.* whether the statement of a witness, which the court had admitted in evidence, was to be considered evidence—is improper and should be refused.—*Wright v. Bolling*..... 259
5. *Charge on preponderance of evidence.*—A charge which instructs the jury, “that, in civil cases, all that is required is that the proof shall preponderate in favor of one party or the other, and that they must find according to the preponderance of the proof;” invades their province, and is therefore erroneous.—*Mays, adm’r. &c., v. Williams*..... 267
6. *Reversal for erroneous affirmative charge.*—An affirmative charge, by which a recovery is erroneously denied to the plaintiff on one specified point, is good cause of reversal, although there may be defects in his proof on other material points; it not appearing from the record that these defects cannot be supplied on another trial.—*Hines and Wife v. Trantham*..... 359
7. *Instructions to the jury, that they must find for defendant if they believe all the evidence.*—The court is authorized to instruct the jury, that if they believe all the evidence they must find for the defendant, only in cases where a demurrer to the evidence, if interposed, might properly have been sustained: such a charge, therefore, should never be given, where there is any evidence which reasonably tends to establish the plaintiff’s case.—*Freeman v. Scurlock et al.*..... 407
8. *Erroneous admission of evidence cured by instructing the jury to disregard it.*—If illegal evidence is admitted for a single specified purpose, and the court afterwards instructs the jury “that that question is not before them, and they are not to regard any proof on that subject,” no injury can possibly result from the error.—*Thomas v. Henderson*.... 523

## COURT AND JURY—CONTINUED.

9. *Charge requiring explanation erroneous.*—A charge asked, which, to prevent it from misleading the jury, requires to be qualified or explained, may properly be refused.—*Godbold v. Blair & Co.* . . . . . 592
10. *Erroneous admission of evidence cured by instructions to jury.*—Although the admission of improper evidence is not cured, by a charge which leaves it discretionary with the jury to disregard it if they choose; yet a charge, which instructs them, in effect, notwithstanding such evidence, to find for the party against whose objection it was admitted, as to the single point on which it could have any possible bearing, cures the error of its admission.—*Winter v. Phelan.* . . . . . 649
11. *When court may charge jury on evidence of single witness.*—Where the evidence of a single witness tends to prove certain facts, which present a particular phase of the case, the court may properly instruct the jury on the effect of his testimony (if believed by them), without noticing the other evidence in the cause: such a charge does not, either expressly or by implication, exclude the other evidence from the consideration of the jury; and if such an inference is apprehended, it may be guarded against by asking other instructions.—*Garrett's Adm'rs v. Garrett & Garrett* . . . . . 687

## CRIMINAL LAW.

1. *Re-arrest of defendant for same offence no discharge of bail.*—After the defendant has been arrested on a criminal charge, and has given bail for his appearance at court, the magistrate has no authority, on the supposition that his bail are insufficient, to cause him to be re-arrested for the same offence; such irregular re-arrest, therefore, is no discharge of his bail.—*Ingram et al. v. The State.* . . . . . 17
2. *Nor subsequent arrest on another charge, nor delivery by another State on requisition of governor.*—The subsequent arrest of the defendant on another charge, or his delivery (after escaping from his bail) by the authorities of another State on the requisition of the governor, when the demand does not seem to be predicated on the same charge, does not discharge his bail; their remedy in such case, it seems, is by application for *habeas corpus.* . . . . . 17
3. *Circumstantial evidence in criminal cases.*—To warrant a conviction in criminal cases upon circumstantial evidence only, where the circumstances are inconclusive in their character—*i. e.* such that, admitting all they tend to prove, the guilt of the accused is still left wholly uncertain, or dependent upon some definite probability—they must be so multiplied as to increase the probability to an indefinite extent beyond the reach of mere calculation: but this principle does not apply to circumstances of a conclusive character, and therefore, before the appellate court can determine that the primary court erred in refusing a charge which asserted the principle generally, the record must show that the evidence was confined to facts entirely inconclusive in their tendency. The true test is, not whether the circumstances proved produce as full conviction as the positive testimony of a single credible witness, but whether they produce moral conviction to the exclusion of every reasonable doubt.—*Mickle v. The State* . . . . . 20
4. *Adultery and fornication distinct offences.*—Under the statute of this State (Code, § 3231; Clay's Digest, p. 431, § 3) adultery and fornication

## CRIMINAL LAW—CONTINUED.

- tion are distinct offences; and therefore, under an indictment for adultery, containing but a single count, no conviction can be had, if the evidence shows that both the parties were unmarried.—*Smitherman v. The State* ..... 23
5. *Form of indictment prescribed by Code, sufficient.*—An indictment in the form prescribed by the Code (No. 73, p. 707), which charges that the defendant “set up, or was concerned in setting up, or carrying on a lottery, without the legislative authority of this State,” is sufficiently certain and definite on motion to quash.—*Salomon v. The State*. . . . . 26
6. *Selling tickets in foreign lottery, as agent, is within the statute.*—Any person who sells in this State any lottery ticket, for or on behalf of any agent, conductor, manager, or proprietor of any lottery which has been set up in this State, or in any other State or country, without the legislative authority of this State, and the prizes in which, at the time of the sale of the ticket, have not been actually distributed, is “concerned in carrying on” such lottery, and therefore guilty of a violation of the statute, (Code, § 3254.) ..... 26
7. *Charge making conviction depend on proof of agency alone, erroneous.*—A charge which instructs the jury, that the case for the State is made out by proof that “the defendant is the agent” of the persons carrying on any lottery not authorized by our statute laws, is erroneous, because it relieves the State from proving that the defendant, within one year before the finding of the indictment, and within the county in which it was preferred, had done an act which amounts to a violation of the statute. . . . . 26
8. *Gaming.*—A room on the second floor of a two-storied house, rented and occupied by the defendant as a sleeping apartment, is not brought within the prohibition of the statute, by the mere fact that the lower story is used by another person for the sale of spirituous liquors.—*Dale and Underwood v. The State*. . . . . 31
9. *License laws not revenue measures.*—The several provisions of the statutes of this State authorizing licenses to retail, are not merely revenue laws: payment of the prescribed tax is only one of the pre-requisites to obtaining a license, and the other provisions of the statute (as to producing certificate, giving bond, and taking oath prescribed) show that the legislature considered it a dangerous privilege, the abuse of which they were intended to guard against.—*Long v. The State*. . . . 32
10. *License to one partner no authority to co-partner or partnership.* Although a license may be granted to a partnership, upon each partner complying with the requisitions of the statute as to certificate, oath, &c.; yet a license to one partner individually confers no authority upon his co-partners or the firm. . . . . 32
11. *Indictment for murder—Admissibility of defendant's declarations.* On the trial of several slaves under an indictment for the murder of another slave, a witness for the State (one E.) testified, that he came up with the defendants immediately after the fight, going towards the house of one W.; that one of them was bleeding profusely from a wound on the back of his head; that on his inquiring how it happened, Frank gave him a false account of the fight, and said that the deceased (who had gone off wounded, and afterwards died from the effects of the wounds) was not much hurt, and had gone home, “and witness said

## CRIMINAL LAW—CONTINUED.

- that he evidently tried to conceal the fact that any serious hurt had been done to any one in the fight;" that he continued the conversation until he got to W.'s house, and witness then went in and brought W. out into the yard where the negroes were. W. was afterwards introduced as a witness by the prisoners, and testified, that he came out immediately upon B.'s going into the house, and that B. came back into the yard with him; "and the prisoners then offered to prove by him, that when he came out, Frank, in reply to questions propounded by him, made a full and fair statement of all that occurred in the fight—the wounds which he had inflicted upon the deceased, the manner in which the fight had been brought about, and the way in which he had been wounded." *Held*, that these declarations were admissible evidence for the prisoners, being a continuation of the conversation commenced with B., although he did not hear them, and tending to rebut the truth of his statement that Frank evidently tried to conceal the true facts of the case.—*Frank et al. (slaves) v. The State.* ..... 37
12. *Conspiracy—Liability of each for acts of others.—Whether act was done in prosecution of common purpose, is a question for the jury, and charge excluding it is erroneous.*—If several persons conspire to do an unlawful act, all are responsible for the acts of each, if done in prosecution of their common purpose; but if an offence is committed by any one of them, from causes having no connection with the common object, he alone is responsible for its consequences. In such cases, it is a question for the jury, whether the act was done in prosecution of the original unlawful purpose, or was independent of it and without previous concert; and a charge which excludes this question from their consideration, is erroneous. .... 37
13. *Participation in attack preconcerted by others, not murder.*—If A. and B., by preconcert, make an attack on C., in which D., not being privy to their common design, participates; this will not be murder in D., if death ensues from wounds inflicted by either A. or B. .... 37
14. *Charge dispensing with proof of venue, erroneous.*—Where the evidence, as set out in the bill of exceptions, did not show that the venue was proved; and "upon this state of facts, the court charged the jury, that if they believed the evidence, they must find the defendant guilty:" *Held*, that the charge was erroneous, because it authorized the jury to find the defendant guilty without any proof that the offence was committed in the county in which the indictment was preferred; and for this error the judgment of conviction was reversed, and the cause remanded.—*Brown v. The State* ..... 47
15. *Gaming—Country store-house is a public house, and prima facie an entirety.*—A store-house in the country is a public house, within the meaning of the statute against gaming, (Code, § 3243); and if it consists of two rooms, one above the other, and the owner controls both, while he uses the lower room as his store, the upper room also is within the prohibition of the statute, unless it affirmatively appears that it is not used as an appendage to the store, nor in the prosecution of its business, nor in connection with the store for the convenience and accommodation of the owner, his employees or customers, but is occupied for some justifiable private purpose, entirely disconnected from the business of the store, or the convenience of the customers ..... 47



CRIMINAL LAW—CONTINUED.

16. *Selling spirituous liquor to slave.*—If the overseer of a slave goes to a house where spirituous liquors are sold, and tells the keeper that he will send the slave for a specified quantity of a particular quality, and goes off and sends the slave with a jug for the same; and thereupon the keeper puts it in the jug, and delivers it to the slave—this is not a sale, gift, or delivery to the slave, within the meaning of section 3283 of the Code, and is lawful without an order in writing.—*Powell v. The State.* 51
17. *Special act of Dec. 16, 1851, "to regulate the sale of spirituous liquors in the town of Elyton," not repealed by Code.*—The act of December 16th, 1851, entitled "an act to regulate the sale of spirituous liquors in the town of Elyton", being a local act inconsistent with the provisions of the Code on the subject of retailing, is expressly continued in force by section 10 of the Code; and, since the two statutes cannot operate together within the same territorial limits, the town of Elyton, with the territory within two miles thereof, is not governed by the provisions of the Code against retailing without a license.—*Camp v. The State* ..... 53
18. *Form of indictment allowed by the Code not sufficient under this act.*—When the State proceeds for a violation of this special act, the indictment must be framed in reference to it, and must either conform to its letter or substance, or must state the facts which constitute the offence created by it: the general form of indictment allowed by the Code (§ 1059) is not sufficient. .... 53
19. *Retailing—Selling to person of known intemperate habits.*—Selling vinous or spirituous liquors, to a person of known intemperate habits, in quantities greater than a quart, is not a violation of the statute.—Code, § 1058.—*Maxwell v. The State.* ..... 660

DAMAGES.

1. *Loss of credit and business as a merchant.*—One of the natural consequences of suing out an attachment against a merchant, on the ground of fraud, would be to injuriously affect his credit and business; such injuries, therefore, form a legitimate ground of recovery in an action on the case, and may be averred in the declaration.—*Goldsmith, Forcheimer & Co. v. Picard.* ..... 142
2. *Compensation incidental to relief in absence of special equity.*—If the plaintiff does not make out a case which entitles him to a decree for specific performance, compensation for damages resulting from a breach of the contract, or for services performed under it for which he may recover at law, will not be decreed him, unless some special equity intervenes. *Sims v. McEwen's Adm'r.* ..... 184
3. *What are demands not sounding in damages merely.*—A demand "not sounding in damages merely", under the statute of set-off (Code, § 2240), is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard.—*Holly v. Younge.* ..... 203
4. *When damages assessed to defendant in detinue.*—If the plaintiff in detinue, by giving the statutory bonds, causes the possession of the slaves sued for to be taken from the defendant and turned over to himself, the jury trying the case are authorized by the act of 1848, "to amend the law in relation to the action of detinue," (Pamphlet Acts 1847-8, p. 82,) to assess the damages and the value of the slaves.—*Rowan v. Hutchisson.* 329

## DAMAGES—CONTINUED.

5. *Measure of damages in trover.*—The general rule in trover, that the measure of damages is the value of the property at the time of the conversion, with interest thereon, was adopted to give the plaintiff a full indemnity for the injury sustained by the defendant's wrongful conversion of his property, and to prevent the defendant from deriving any benefit from his own wrongful act; but there are cases to which this rule has no just application, and in which the equity of the case is allowed to mitigate the damages.—*Williams, adm'r, &c., v. Crum*. . . . . 468
6. *Injury to dog actionable.*—A dog is a species of property, for an injury to which an action at law may be maintained; and it is not necessary to show that he had pecuniary value.—*Parker v. Mise*. . . . . 480
7. *Exemplary damages allowable for trespass on property.*—The law implies that some damage is sustained from every wrongful injury to property, although there may be in fact no sensible damage; and if the trespass is accompanied by circumstances of aggravation, "smart money", or exemplary damages, may be assessed by the jury, although the property itself had no pecuniary value. . . . . 480
8. *Liability of hirer of slave for negligence.*—The hirer of a slave is responsible only for the omission of that care and diligence which the generality of mankind use and exercise in relation to their own slaves under similar circumstances; and if he re-hires the slave to another, his own contract of hiring being general in its terms, he is equally responsible for the same degree of negligence on the part of his bailee.—*Ala. & Tenn. Rivers Railroad Co. v. Burke*. . . . . 535
9. *Failure to call in physician not necessarily negligence.*—The law does not make it the duty of the hirer, under a contract general in its terms, to call in a physician on every occasion when the slave is sick and he does not know what is the matter with him; nor does it pronounce him guilty of neglect, merely because he does not, under such circumstances, call in a physician. . . . . 535
10. *Act tending to show negligence may be proved to have been done under advice of physician.*—Where the plaintiff introduces evidence of an act tending to show negligence in the treatment of the slave—*e. g.*, his removal by railroad, while sick—the defendant has the right to prove that he acted under the advice of a physician. . . . . 535
11. *Recoupment of damages on breach of contract.*—Plaintiffs contracted to deliver to defendant, who was a grocer, a certain quantity of Cincinnati hams, at a stipulated price per pound; to be delivered during the season as defendant might want them, and to be paid for on delivery. After the delivery of a part of the specified quantity, the price of hams rose, and plaintiffs became unable to complete their contract; and defendant having refused to pay for those already delivered, they brought suit for the price: *Held*, that defendant, if he then knew that plaintiffs were unable to complete their contract, might refuse to pay, and might recoup his damages.—*Robertson v. Davenport & Patterson*. . . . . 574
12. *Measure of damages for breach of warranty of quality.*—On a breach of warranty, as to the quality of an article sold, the purchaser is entitled to recover, *at least*, the difference between its actual value and what would have been its value as warranted; but, since the jury may also allow interest on that sum, the court may properly refuse to instruct them, that that difference in value is the measure of damages.—*Foster v. Rodgers*. . . . . 602

DAMAGES—CONTINUED.

13. *Exemplary damages, when allowable.*—The law allows vindictive, or exemplary damages, whenever the trespass is committed in a rude, aggravating, or insulting manner, since malice may be inferred from these circumstances.—*Roberts v. Heim* ..... 678
14. *Counsel fees, when recoverable.*—Counsel fees paid by the claimant in the suit brought to try the right of property, may be taken into consideration by the jury in assessing his damages, in a subsequent action for damages against the plaintiff in attachment ..... 678

DEBTOR AND CREDITOR.

1. *Extinguishment of debt by appointment of creditor as debtor's executor.*—In England, if a debtor makes his creditor, or the executor of his creditor, his executor, and the latter accepts the trust, and receives sufficient assets of the debtor's estate, the debt is extinguished; but this doctrine, which results from the power there possessed by the executor over the personal estate of his testator, does not obtain to the same extent in this State, where an executor has no right to take the assets other than money and retain them in satisfaction of his debt; and consequently, in such case, the debt cannot be considered extinguished, unless it is also shown that moneys came to the hands of the executor, which were sufficient for the payment of the demand, and which he might lawfully retain in satisfaction of it.—*Kimball v. Moody* ..... 130
2. *When retainer, and consequent extinguishment, will be presumed.*—Where it is shown that the debtor, at the time of his death, was seized and possessed of a large estate, consisting of both real and personal property, which went into the hands of his executor, who administered on the estate for nearly twelve years, and at his death left a large portion of the assets unadministered, which afterwards came to the hands of his successor, it will be presumed that the executor did his duty—that he reduced into money assets of sufficient amount to pay the debts of the estate; and since (if he did not) he ought and could have done so, equity will consider that as done which ought to have been done, and hold the debt extinguished. .... 130
3. *Debtor's beneficial interest in property bequeathed to trustee for use and benefit of him and his family, but not to be liable for his debts, cannot be subjected in equity by his creditors.*—A bequest to a trustee of a certain share of the testator's estate, "for the use and benefit of his son Thomas", contained these provisions: The property was to be held, used, and managed by the trustee, who was also empowered, with the assent of the said Thomas, to sell the slaves, and to reinvest the proceeds of sale in other property to be held on the same trust. The trustee was expressly forbidden to pay any of the debts of the said Thomas, and was directed "to pay over to the said Thomas, from time to time, such part of the income of the said trust estate (or the whole thereof, if required) as may be necessary for the comfortable and reasonable support of the said Thomas, and of his wife and children, should he have any; the same to be used by the said Thomas." On the death of the said Thomas, the property was to be disposed of in such manner as he might by his last will and testament direct: if he died intestate, leaving a wife or child, the property was to be delivered over to them; and if he left neither wife nor child, it was to return to the testator's estate, and be distribu-

## DEBTOR AND CREDITOR—CONTINUED.

- ted as though no such bequest had ever been made. The said Thomas was unmarried at the time of the testator's death, but subsequently married, and his wife was living when this bill was filed against him. *Held*, that the bequest was intended as a prospective provision for the debtor's wife and children as well as for himself, that his wife took a joint interest with him in such portion of the income of the trust estate as might be necessary for their comfortable and reasonable support, and that no portion of the income could be subjected in equity by his creditors.—*Hill and Wife v. McRae*. . . . . 175
4. *Negotiable note of debtor, taken at or after creation of the debt, not per se payment.* The taking of a debtor's negotiable note, at or after the creation of the debt, is not a payment or extinguishment of the debt itself, unless there is an agreement so to receive it : in the absence of any such agreement, if the note is not paid at maturity, the creditor may sue on the original cause of action ; and if he produces the note at the trial, and offers to give it up to the defendant, and the evidence shows that it was taken "for the purpose of closing the account on the books", it is not error to instruct the jury that "the taking of the note does not raise the presumption of payment."—*Mooring v. Mobile Marine Dock & Ins. Co.* . . . 254
5. *Mortgage taken by bona fide creditor, with implied notice of debtor's insolvency, conveying all his property, and containing terms beneficial to him, held fraudulent and void as to other creditors.*—A bona fide creditor, whose debt was past due, and who was charged with implied notice of the insolvency of his debtors, took from them, as the best terms he could obtain for his security, a mortgage on all their property of whatsoever description—to-wit, all their partnership effects, books, notes, and accounts ; and all their individual property, consisting of lands and negroes, all the stock and provisions then on hand, or which might afterwards at any time be on hand, all the cotton and corn which might be produced up to the law-day of the mortgage, all farming utensils, and household and kitchen furniture. The law-day of the mortgage was postponed for nearly six years, the possession in the meantime remaining with the mortgagors ; and it was shown that the property conveyed greatly exceeded in value the amount of the mortgage debt : *Held*, that the mortgage was fraudulent and void as to the other creditors of the mortgagors.—*Wiley, Banks & Co. v. Knight*. . . . . 336
6. *Notice to agent implied from circumstances.*—Complainants, having a large claim, past due, on a mercantile firm then on the eve of insolvency, placed it, for collection or security, in the hands of an attorney at law who resided in the same town with the debtors. The attorney, although he did not know positively that the debtors were in failing circumstances, knew that a mortgage for a large debt covered their property, that there were other demands existing against them, some of which were in his own hands for collection, and for which he had endeavored to obtain collateral security, and that the balance of the notes and accounts due the firm, which had not been transferred to others, was almost worthless ; and knowing these facts, he took from them, as the best security he could obtain for his clients, a mortgage on all their property, containing terms very beneficial to the debtors : *Held*, that these circumstances were sufficient to charge him with implied notice of the debtors' insolvency. . . . . 336



DEBTOR AND CREDITOR—CONTINUED.

7. *Mortgage void for constructive fraud, not valid security in part.*—Where a part of the consideration of a mortgage, which is void for constructive fraud as against creditors, is the payment by the mortgagees of a previous incumbrance on a portion of the property, it cannot stand as a valid security for their reimbursement. . . . . 336
8. *Application by law of payment on running account.*—When there is a running account between debtor and creditor, a general payment, in the absence of any application by the parties, and where the character of the dealings or other circumstances do not show a different intention, will be applied by law to the charges in the order of time in which they accrued, without reference to the fact that one item may be better secured than another; since the particular parts, being blended together in one common account, have no longer any separate existence, and the balance only is considered as due.—*Harrison & Robinson v. Johnston.* 445
9. *This rule applied against debtor's surety.*—The foregoing rule applies in this case, where the defendant became surety for the debtor on a note given to his commission merchant, with whom he had a running account for advances made, cotton sold, &c., on which the note was credited when received, and debited when due; an account current being rendered to the debtor after the maturity of the note, showing a balance against him larger than the amount of the note, and the subsequent payments being credited on general account. . . . . 445
10. *Payment referred to existing debt.*—In the absence of evidence showing most unmistakably the intention of the parties, a general payment to a commission merchant, with whom the debtor has a running account, will be referred to his existing indebtedness, and not to future advances. 445
11. *Collateral security does not extinguish original debt.*—If an agent to collect takes a note as collateral security, no inference of payment can properly be drawn from the recognition of the act by his principal.—*Powell's Adm'r v. Henry.* . . . . . 612
12. *Liability of creditor for note taken as collateral security.*—If a creditor takes a note on a third person as collateral security for his debt, he is bound to the use of due diligence in its collection, and is responsible to his debtor for any damages caused by his laches; but if the note is on an insolvent person, its retention for never so long a period will not authorize the inference of payment of the original debt. . . . . 612

DEEDS AND CONVEYANCES.

1. *Absolute deed of riparian proprietor.*—The absolute deed of a riparian proprietor conveys the right to the undiminished flow of the stream, and no reservation of a right to divert can be implied from the fact that, at the time of the execution of the conveyance, he diverted the water to supply a mill on another tract of land owned by him; especially when the claim is set up by a stranger.—*Burden v. Stein.* . . . . . 104
2. *Construction of statute requiring registration of deeds of trust.*—Deeds of trust conveying real property are placed by the statute (Clay's Digest, p. 255, § 5) on the same footing with deeds of personalty, except as to the time allowed for registration, and the same rules of construction are applicable to both. Under the construction heretofore adopted as to deeds of personalty, if a lien attaches in favor of a judgment creditor before notice of a deed not duly recorded, the purchaser is protected, although

## DEEDS AND CONVEYANCES—CONTINUED.

- he may have had notice of the deed at the time of his purchase; and this construction is hereby extended to deeds conveying real estate. *DeVendell v. Doe ex dem. Hamilton*..... 156
3. *Primary and secondary evidence of deeds*.—Parol evidence cannot be received to prove the existence of title to land by patent or deed, until the proper predicate is laid for its introduction.—*Hussey v. Roquemore*. 281
4. *Non-residence of grantor not sufficient to authorize secondary evidence of deed*.—In a suit to which the grantee is a party, the non-residence of his grantor, of itself, does not authorize the introduction of secondary evidence to prove title in the grantee under the deed: the presumption being that the deed is in the possession of the grantee, he must be notified to produce it, or its loss or non-existence must be established, before resort can be had to inferior evidence..... 281
5. *Deed void as to third persons, good between parties*.—A deed which is fraudulent and void as to creditors whose debts are delayed, is nevertheless valid as between the parties themselves, and neither can set up the fraud to avoid it.—*Wiley, Banks & Co. v. Knight*..... 336
6. *Admissibility of parol evidence to prove absolute deed a trust*.—It is the settled law of this State, that parol evidence is admissible to show that a deed, absolute on its face, was received in trust for a particular purpose, and that the vendee was a mere conduit for passing the title.—*Edmondson v. Welsh and Wife*..... 578

## DEPOSITIONS.

1. *Will not be suppressed because they were taken before the amended declaration was filed*.—The fact that depositions were taken before the amended declaration was filed, is not a sufficient reason for their suppression, when no specific objection is made to them, and it is not shown that the issue was substantially varied by the amendment.—*Goldsmith, Forcheimer & Co. v. Picard*..... 142
2. *Answer not responsive to interrogatory, and stating opinion or legal conclusion, properly suppressed*.—A witness, testifying to a parol gift of a slave, was asked, on cross-examination, whether control and possession passed to the grantee at the time of the gift, or whether the grantor still retained possession; and answered, "I considered that the control and possession of the slave did pass to the grantee at the time, and the slave was known as his property from that time": *Held*, that the answer was properly suppressed, because it was not responsive to the interrogatory, and because it stated mere opinion and legal conclusion instead of facts. *Thomas v. DeGraffenreid*..... 651

## DETINUE.

1. *What title will support detinue*.—To maintain detinue, the plaintiff must have, at the time his action is commenced, a general or special property in the chattel sued for, and the right to its immediate possession; and if he has never had the actual possession, he cannot recover without showing a legal title.—*Reese v. Harris*..... 301
2. *Distributee, in Virginia, as at common law, cannot bring detinue*.—At common law, the title to the personal property of an intestate is cast upon his personal representative, and not upon his next of kin; and the statutes of Virginia, as shown in the record in this case, have not changed the

DETINUE—CONTINUED.

- common law in this respect; and consequently a sole distributee in Virginia, who has never had possession, before administration granted or distribution made, has not such a title to the personalty as will sustain detinue. . . . . 301
3. *When damages assessed to defendant.*—If the plaintiff in detinue, by giving the statutory bonds, causes the possession of the slaves sued for to be taken from the defendant and turned over to himself, the jury trying the case are authorized by the act of 1848, "to amend the law in relation to the action of detinue;" (Pamphlet Acts 1847–8, p. 82.) to assess the damages and the value of the slaves.—*Rowan v. Hutchisson*. . . . . 329
4. *Judgment on verdict for defendant.*—Issues being joined on the pleas of *non detinet* and justification under legal process, a verdict finding the defendant not guilty, and assessing the damages and the separate value of the slaves, is sufficient under this statute to support a judgment in his favor. 329
5. *Distinction between detinue and trespass or trover in splitting single cause of action.* Trespass, trover, or detinue, at the election of the party injured, may sometimes be maintained for the same wrongful act to several specific chattels. If he elects to proceed in trespass or trover, he is bound to regard the act as indivisible, and cannot afterwards split it up into several causes of action; but if he elects to bring detinue, he may maintain a separate action for the detention of each chattel.—*Wittick v. Traun*. . . . . 562
6. *Sufficiency of verdict in detinue.*—In detinue for eight slaves, a trial being had on the plea of the general issue, the jury returned a verdict that "they find for the plaintiff, and assess the value of the slaves sued for as follows," &c., (specifying by name, and assessing the separate value of all the slaves, except one, as to whom the verdict was entirely silent,) "and they also find the hire of said slaves to be \$200": *Held*, that the verdict was not sufficient to authorize the rendition of judgment; while *RICE, J., dissenting*, held that it was a good finding for the plaintiff for the seven slaves named, with their hire as damages for their detention, and against the plaintiff as to the slave not named in the verdict. . . . . 562

DIVORCE.

1. *Acts of cruelty proved but not alleged no ground for divorce.*—Specific acts of cruelty which are established by the evidence, but not charged in the bill, cannot be made the foundation for a decree, although the court may well consider and give weight to them as tending to explain and corroborate other acts specifically alleged in the bill.—*David v. David*. 222
2. *Substance of charge only need be proved.*—The particular act of violence charged in the bill must be substantially proved, but it is not necessary that all the non-essential circumstances attending it should be proved precisely as alleged; thus, where the wife charged in her bill that her husband struck her several times with a stick, choked her down, and drew his knife and threatened to cut her throat, while the evidence was that he choked her, struck her with a whip, and pulled her hair—held no material variance. . . . . 222
3. *What is cruelty on the part of husband.*—Cruelty, where it does not affect life, limb, or health, is frequently a relative term, whose meaning must be determined by the particular circumstances of each case: between persons of education, refinement, and delicacy, the slightest blow in

## DIVORCE—CONTINUED.

- anger might be cruelty, while between persons of a different character and walk in life, it might not mar to any great extent their conjugal relations, nor materially interfere with their happiness. . . . . 222
4. *How affected by provocation on part of wife.*—If the evidence shows that the wife, by her own misconduct, has brought upon herself the ill-treatment of which she complains, and which is not wholly disproportioned to the provocation, she is required to make out a much stronger case for relief than when her own conduct has been entirely blameless; and on this ground a divorce was refused in this case. . . . . 222
5. *Costs.*—The bill having been dismissed, and a divorce refused, on the ground that both parties were in fault, the costs were equally divided. 222
6. *Alimony pending suit for divorce.*—The wife has a right to a support out of her husband's estate, pending a suit for divorce against him, and also to such sum as is necessary to procure solicitors to conduct the suit for her; and when this right is denied by the chancellor at any time before permanent alimony is finally set apart to her, a *mandamus* will be awarded from the Supreme Court, to compel him to make the necessary order, as there is no other adequate and specific remedy.—*Ex parte King*. 387
7. *Allegation of wife's fear, without stating facts, insufficient to enjoin husband's removal of his property.*—Where the wife files a bill against her husband for a divorce *a vinculo*, and alleges "that she has just cause to fear, and in fact does fear, that upon the filing and service of this bill he will remove or dispose of his whole property", but does not state the facts which cause her fears, the allegations are not sufficient to authorize an injunction to prevent the removal of the defendant's property. . . . . 519
8. *Bill may be filed in county of defendant's residence.*—Held, on the authority of *Reese v. Reese*, 23 Ala. 785, that the bill in this case was improperly dismissed by the chancellor, on the ground that it could not be filed in the county of the defendant's residence.—*Wiley v. Wiley*. . . . . 704

## DOWER.

1. *What seizin of husband gives right to dower.*—To entitle the widow to dower in lands of which her husband was seized during the coverture, he must have been beneficially seized, though but for a moment, to his own use, and not as a mere conduit for passing the title.—*Edmondson v. Welsh and Wife*. . . . . 578
2. *Estoppel against denial of husband's seizin.*—Where the demandant's husband was the mere conduit for passing the title from his vendors as trustees back to them individually, a party deriving title from them is not estopped from showing that he had no beneficial seizin: his seizin is not thereby denied, but only explained. . . . . 578
3. *Evidence held sufficient to explain husband's seizin.*—The demandant's husband, on receiving a deed with covenants of warranty from the assignees of a mortgage, re-conveyed to them on the same day by quit-claim deed; and the subscribing witness to the deeds testified, that the husband purchased at the sale for the assignees, that no money passed between the parties, and that the transfer of deeds was intended to make good titles to the property: *Held*, that the evidence was sufficient to show that the husband had no beneficial seizin of the land. . . . . 578



EJECTMENT.

See REAL ACTIONS.

EMINENT DOMAIN.

1. *Its application to City Water-Works of Mobile.*—The right of eminent domain, in the assumption and appropriation of private property for public uses, is recognized and admitted, and supplying a city with water is admitted to be a public use within the meaning of the constitution; but this right can only be exercised upon making just compensation to the owner, nor does it confer on the lessee of the City Water-Works of Mobile, in connection with the several acts of the legislature relating thereto, the power to deprive other riparian proprietors of their right to the water of Bayou Chataque, which he can only obtain by pursuing the course pointed out in the statute.—*Burden v. Stein*..... 104

ERROR.

I. WHAT IS REVISABLE ON ERROR.

1. *Amendment of declaration not revisable on error.*—The amendment of the declaration after issue joined, but before the cause is submitted to the jury, is discretionary with the primary court, and consequently not revisable on error.—*Goldsmith, Forcheimer & Co. v. Picard*..... 142
2. *Decision on question of fact not revisable.*—When a cause is submitted to the decision of the judge, without the intervention of a jury, on an agreed statement of facts, with leave to either party to appeal from his judgment, his decision on a question of fact is not revisable on error.—*DeVendell v. Doe ex dem. Hamilton* ..... 156
3. *Pleading to amended complaint, without objection, waives error in its allowance.*—After a demurrer has been sustained to the original complaint, and leave given to the plaintiff to amend, if the defendant pleads to the amended or substituted complaint, without objecting to the leave to amend, or to the amendment itself, he thereby waives his right to revise on error the action of the court in allowing it.—*Bryan et al. v. Wilson*..... 208

II. WHAT ERRORS ARE NOT REVERSIBLE.

4. *When defendant is entitled to judgment on verdict.*—Where issue is joined on several pleas in bar of the action, one of which is good, and the jury by their verdict “find the issues in favor of the defendants”, the defendants are entitled to judgments; and if the court erred in overruling demurrers to the other pleas, it is error without injury, which will not reverse the judgment.—*The State v. Brantley*..... 44
5. *Error without injury will not reverse.*—*Mobile Ins. Co. v. McMillan*... 78
6. *Refusal to strike out immaterial averments in declaration.*—The refusal to strike out immaterial averments, or matters which are stated in the declaration only by way of inducement, is not a reversible error, since the plaintiff could derive no advantage from them, nor could the defendant be thereby prejudiced.—*Goldsmith, Forcheimer & Co. v. Picard*..... 142
7. *Admission of relevant evidence for wrong purpose.*—When evidence is relevant and admissible for one specific purpose, its admission by the court for another purpose is not a reversible error..... 142
8. *Error without injury.*—If the evidence, as stated in the bill of exceptions, shows that the plaintiff has not such a title as will sustain his action, the appellate court will not, at his instance, examine into the correctness of the charges given or refused by the primary court; since, even if

## ERROR—CONTINUED.

- erroneous, no legal injury could have resulted to him.—*Reese v. Harris*. 301
9. *Erroneous admission of evidence cured by instructing the jury to disregard it.*—If illegal evidence is admitted for a single specified purpose, and the court afterwards instructs the jury “that the question is not before them, and they are not to regard any proof on that subject,” no injury can possibly result from the error.—*Thomas v. Henderson*. . . . . 523
10. *Error on trial of immaterial issue works no injury.*—Where issues at law are directed to try the validity of a will and of a deed of gift, which are so connected by words of reference that if the will is valid the deed cannot be held invalid, and the verdict of the jury establishes the validity of the will, the trial of the other issue is an immaterial matter, and its regularity will not be looked into on error.—*Dabbs v. Dabbs*. . . . . 646
11. *Costs.*—Where the verdict is in favor of the will, and the court trying the issue erroneously renders judgment for the costs against the heir, besides certifying the costs to the chancellor, by whom also they are decreed against the heir, the error is without injury. . . . . 646
12. *Erroneous admission of evidence cured by instructions to jury.*—Although the admission of improper evidence is not cured, by a charge which leaves it discretionary with the jury to disregard it if they choose; yet a charge, which instructs them, in effect, notwithstanding such evidence, to find for the party against whose objection it was admitted, as to the single point on which it could have any possible bearing, cures the error of its admission.—*Winter v. Phelan*. . . . . 649
- III. WHAT ERRORS ARE REVERSIBLE.
13. *Refusal to decide motion to exclude evidence, when made.*—*McCargo & Cordle v. Crutcher*. . . . . 171
14. *Reversal for erroneous affirmative charge.*—An affirmative charge, by which a recovery is erroneously denied to the plaintiff on one specified point, is good cause of reversal, although there may be defects in his proof on other material points; it not appearing from the record that these defects cannot be supplied on another trial.—*Hines and Wife v. Trantham*. . . . . 359
15. *Injury presumed from error.*—If an incompetent witness, to whom objection is duly made and reserved, is allowed to testify to material facts, injury will be presumed from the error, unless such presumption is repelled by the record; and though some of the facts to which he deposes are proved witnesses on the other side, yet this does not cure the error.—*Doe ex dem. Kennedy's Heirs v. Reynolds*. . . . . 361
16. *Injury presumed from error.*—Injury will be presumed from the erroneous admission of irrelevant evidence, unless the contrary clearly appears; since, if such evidence can do no other harm, it may obscure the real points in issue.—*Thomas v. De Graffenreid*. . . . . 651
17. *Remandment of cause on reversal of decree.*—Where a bill for divorce is dismissed by the chancellor for want of jurisdiction, and his decree is reversed on error, the cause will be remanded to the primary court, although the evidence shows that the complainant is entitled to a decree, when it may become necessary to make some provision for the wife, or some order in relation to her separate estate, which the appellate court cannot make.—*Wiley v. Wiley*. . . . . 704

ESTOPPEL.

1. *When administrator is estopped from denying that purchase was made with funds of the estate.*—Where an administrator agrees with his co-administrator that they will buy certain lands for the estate at the Government land sales, and in compliance with that agreement procures him to join in raising funds for that purpose, and charges the estate with the expense of raising those funds; and prevents his co-administrator and the only adult son of the decedent from attending the sales, by assuring them that he will buy the lands for the estate, and at the sale prevents other persons from bidding for them, by declaring that he had come there expressly to buy them for the estate; and by these means, and with these funds, buys the lands for a sum greatly below what he would otherwise have had to pay for them, and takes the title in his own name, and soon afterwards re-sells them for a large profit,—he is estopped in equity, as against those representing the estate, from denying that the funds belonged to the estate. (Chilton, C. J., dissenting.)—Mosely et al. v. Lane..... 62
2. *When plaintiff is estopped from bringing trover by previous action of assumpsit and satisfaction thereof.*—The unauthorized transfer, by the secretary of an incorporated insurance company, of promissory notes and bills of exchange belonging to the company, is a conversion for which trover may be maintained; but if the company, with full knowledge of the tort, brings assumpsit against its secretary for the amount of the bills and notes, summons the transferee by process of garnishment, takes judgment against him for the balance of indebtedness admitted by the answer on account of the bills and notes, and coerces satisfaction of the judgment—this will be held a confirmation of the transaction, and will estop the company from afterwards bringing trover against the transferee.—Firemen's Ins. Co. v. Cochran & Co... 228
3. *Mortgage—Contemporaneous parol agreement.*—A debtor by book account gave his creditor a mortgage, which purported on its face to secure only his present indebtedness; but there was a contemporaneous parol agreement that it should operate prospectively, so as to secure the account contracted during the remainder of the year. After the law-day of the mortgage, the debtor gave his note for the amount of the mortgage debt, with a surety as co-maker, to whom, in consideration of his signing the note, the creditor at the same time assigned the mortgage by written endorsement; and at the time of this transaction, the creditor stated that the debt due under the mortgage was the amount for which the note was given, but no book or account was produced, nor did the debtor say anything as to the amount of the debt: *Held*, that if the surety signed the note with a knowledge of the parol agreement, he could not defeat a recovery on the note by insisting that the mortgage only afforded him a partial indemnity; and, on the other hand, that both his principal and the creditor were estopped from saying that the mortgage did not cover the entire amount for which the note was given.—Wright v. Bolling ..... 259
4. *Estoppel cannot arise from promise made on Sunday.*—A promise made on Sunday to pay the balance due on a promissory note, against which the promisor has a valid defence, even if made under circumstances

## ESTOPPEL—CONTINUED.

- which ordinarily would estop him from setting up that defence, is void under the statute, and has no binding effect.—*Hussey v. Roquemore*. . . 281
5. *Estoppel against denial of husband's seizin*.—Where the demandant's husband was the mere conduit for passing the title from his vendors as trustees back to them individually, a party deriving title from them is not estopped from showing that he had no beneficial seizin: his seizin is not thereby denied, but only explained.—*Edmondson v. Welsh and Wife*. . . 578
6. *Estoppel against setting up outstanding title*.—Where the plaintiff and defendant in ejectment derive title through mesne conveyances from the same vendor, there is no necessity for proof of title beyond him, and the defendant cannot set up an outstanding title in a third person; and that the plaintiff claims under a quit-claim deed, while the defendant claims under a subsequent purchase at execution sale, does not affect the principle, unless the defendant can show that the defendant in execution, after the execution of plaintiff's quit-claim deed, acquired a superior title.—*Gantt v. Doe ex dem. Cowan*. . . . . 582
7. *Estoppel against denying validity of judicial proceedings by claiming title under them*.—Where the plaintiff and defendant both derive title from a purchaser at an administrator's sale, made under an order of the probate court, the defendant is estopped from denying the validity of the proceedings connected with the sale.—*Garrett et al. v. Lyle*. 586
8. *Admissions, conclusiveness of*.—Admissions, to be conclusive on the party making them, must be made under such circumstances as to amount to an estoppel *in pais*.—*Garrett's Adm'r's v. Garrett & Garrett*. 687

## EVIDENCE.

## I. GOVERNED BY WHAT LAW.

1. *Causes pending when Code took effect*.—The effect of the exception contained in section 12 is, to exempt causes pending when the Code went into operation—to-wit, January 17, 1853—from the operation of its provisions affecting testimony; therefore, in such a case, the transferor of the instrument sued on, though declared by section 2290 an incompetent witness for his transferee, may still be rendered competent by a release.—*Hiscox v. Hendree* . . . . . 216
2. *Causes commenced since Code took effect*.—In all civil actions commenced since the adoption of the Code, although founded on contracts whose validity must be determined by the old law, the rules of evidence prescribed by the Code must govern.—*Mays, adm'r, &c. v. Williams*. . . 267

## II. MATTERS JUDICIALLY KNOWN.

3. *Sheriffs*.—The courts are bound to know judicially who are the sheriffs of the several counties in the State.—*Ingram v. The State*. . . . . 17

## III. OF PARTIES TO ACTION.

4. *Plaintiff must swear to fact of non-payment*.—If the plaintiff seeks (under section 2813 of the Code) to establish "the correctness of his demand" by his own oath, he cannot be permitted so to shape the facts to which he swears, as to deprive the defendant of the right to prove by his oath that the demand has been paid: he must, therefore, not only state facts which, if proven by other witnesses, would make out a *prima*



EVIDENCE—CONTINUED.

- facie* case of indebtedness on the part of the defendant to him, but he must also swear to the fact of non-payment; and if he fails to do this, it is not erroneous to exclude from the jury all that he states.—*Jordan v. Owen*. . . . . 152
5. *Motion to suppress answers, when and how made*.—The party filing interrogatories to his adversary has the legal right to move the suppression of the answers, or any part of them, before the commencement of the trial; and if he wishes to review on error the action of the court on his motion, the proper practice, *it seems*, is to decline to read the answers on the trial.—*McCargo & Cordle v. Crutcher*. . . . . 171
6. *Refusal of court to decide such motion when made, reversible error*. If the court, at the time such motion is made, “declines to sustain or overrule said motion, remarking that it would decide on the motion when the facts of the case were developed”; and the party making the motion excepts to the action of the court, and then declines to read the answers on the trial, he is entitled to a reversal of the judgment obtained against him, if any portion of the answers embraced in the motion contained illegal evidence. (*Chilton, C. J., dissenting*, held, that it was error without injury, since the court might properly have overruled the motion. . . . . 171

IV. CONFESSIONS—DECLARATIONS—HEARSAY—RES GESTÆ.

7. *Defendant's declarations admitted on indictment for murder*.—On the trial of several slaves under an indictment for the murder of another slave, a witness for the State (one B.) testified, that he came up with the defendants immediately after the fight, going towards the house of one W.; that one of them was bleeding profusely from a wound on the back of his head; that on his inquiring how it happened, Frank gave him a false account of the fight, and said that the deceased (who had gone off wounded, and afterwards died from the effects of the wounds) was not much hurt, and had gone home, “and witness said that he evidently tried to conceal the fact that any serious hurt had been done to any one in the fight;” that he continued the conversation until he got to W.'s house, and witness then went in and brought W. out into the yard where the negroes were. W. was afterwards introduced as a witness by the prisoners, and testified, that he came out immediately upon B.'s going into the house, and that B. came back into the yard with him; “and the prisoners then offered to prove by him, that when he came out, Frank, in reply to questions propounded by him, made a full and fair statement of all that occurred in the fight—the wounds which he had inflicted upon the deceased, the manner in which the fight had been brought about, and the way in which he had been wounded.” *Held*, that these declarations were admissible evidence for the prisoners, being a continuation of the conversation commenced with B., although he did not hear them, and tending to rebut the truth of his statement that Frank evidently tried to conceal the true facts of the case.—*Frank et al. (slaves) v. The State*. . . . . 37
8. *Declarations of ownership, unaccompanied by possession, not admissible evidence*.—Declarations of ownership of a slave, made by a party who is not shown to have had possession at the time, are not admissible

## EVIDENCE—CONTINUED.

- evidence for him in a suit involving the title.—*Rowan v. Hutchisson*. 328
9. *Declarations of slaves inadmissible on question of ownership*.—The declarations of an old female slave, who lived at the same house with her grandchildren, respecting her possession of them, are not admissible evidence on the question of ownership, since (other reasons aside) she cannot have such possession as will authorize their admission. . . . 328
10. *Admissibility of other evidence to prove ownership*.—In *detinue* against a sheriff for slaves taken under attachment, the question was whether the slaves belonged to plaintiff, or to his brother, the defendant in attachment, who had gone to California before the levy of the attachment, leaving the slaves in the house in which he last resided: *Held*, that defendant, to repel the idea of abandonment on the part of said defendant in attachment, and to show title in him, might prove that, while in possession of said slaves, he had mortgaged them; that when the steamboat on which he left was about quitting the wharf, he declared his intention soon to return; and that plaintiff, after his brother's departure, had returned an assessment under oath of his own property, in which said slaves were not included. . . . 328
11. Deed received in evidence as an admission in writing. . . . 328
12. *Declarations of ownership, when accompanied with possession, and when referring to past transactions*.—Declarations of ownership of a slave, when accompanied with possession, are admissible evidence as a part of the *res gestæ*; but declarations referring to a past transaction are mere hearsay, and therefore inadmissible.—*Martin v. Hardesty* . . . 458
13. *Hearsay inadmissible*.—A witness, who saw two persons engaged in writing, cannot testify to the character of the writing from what one of the parties afterwards told him respecting it: such evidence, relating to a past transaction of which the conversation formed no part, is mere hearsay . . . 458
14. *Declarations of ownership by one in possession admissible as part of the res gestæ*.—The declarations of the defendant in execution to the sheriff, when the latter was about to levy an execution on another slave as the property of his son—"that he might go contented without her, that he would never get a negro there on his son's account, and that every negro there belonged to himself"—when it is shown that the slave in controversy was then in his possession, are admissible evidence as part of the *res gestæ*, being explanatory of his possession.—*Thomas v. Henderson* . . . 523
15. *Admissions of one joint contractor admissible against others*.—In *assumpsit* against three joint makers of a promissory note, the admissions of one of the defendants are competent evidence against his co-defendants; at least, until the inference arising from the face of the note is rebutted, and it is shown that he is not jointly interested with the others.—*Camp v. Dill* . . . 553
16. *Relevancy of evidence as tending to show ownership*.—Where the slaves in controversy lived and worked on the plantation owned by the defendant in execution, together with himself and his children, and constituted a part of his family, the fact that he furnished the family with necessaries, is evidence (though weak) tending to prove his ownership of the slaves.—*Thomas v. De Graffenreid* . . . 651

EVIDENCE—CONTINUED.

17. *Relevancy of evidence as tending to disprove ownership.*—But the fact that the defendant in execution did not obtain credit on the faith of the slaves in his possession, is not competent evidence to disprove his ownership. . . . . 651
18. *Declarations explanatory of possession.*—The answer of a third person, to a proposition to purchase one of the slaves in controversy, is not competent evidence, unless it is shown that the slave was in his possession, and the reply tended to explain that fact . . . . . 651
19. *Declarations in disparagement of title.*—Declarations made by the defendant in execution, while in possession of the slave in controversy, to the effect that said slave did not belong to him, but to the claimant, who was his daughter, although they may be entitled to but little (if any) weight, are admissible evidence for the claimant. . . . . 651
20. *Admissions, conclusiveness of.*—Admissions, to be conclusive on the party making them, must be made under such circumstances as to amount to an estoppel *in pais*.—Garrett's Adm'rs v. Garrett & Garrett. 687

V. PRIMARY AND SECONDARY.

21. *Primary and secondary evidence of deeds.*—Parol evidence cannot be received to prove the existence of title to land by patent or deed, until the proper predicate is laid for its introduction.—Hussey v. Roquemore. 281
22. *Non-residence of grantor not sufficient to authorize secondary evidence of deed.*—In a suit to which the grantee is a party, the non-residence of his grantor, of itself, does not authorize the introduction of secondary evidence to prove title in the grantee under the deed: the presumption being that the deed is in the possession of the grantee, he must be notified to produce it, or its loss or non-existence must be established, before resort can be had to inferior evidence. . . . . 281
23. *Parol evidence of judicial proceedings inadmissible.*—A witness cannot testify to the foreclosure and sale of mortgaged premises: the record of the suit is the proper evidence—Doe ex dem. Kennedy's Heirs v. Reynolds . . . . . 364
24. *Waiver of objection to secondary though primary is not produced.* When a party elicits, on cross-examination of a witness, parol evidence of judicial proceedings, which constitutes new matter and is directly responsive to the interrogatory, and afterwards declines to read the answers to the cross-interrogatories on the trial, he cannot, when his adversary offers to read them, raise the objection that the record was not produced nor its absence accounted for; and that the evidence thus elicited is also incidentally stated by the witness in answer to a direct interrogatory, does not affect the principle.—Thomas v. Henderson. . . 523
25. *Proof of merchant's account by parol testimony of his clerk and by his books.*—A merchant's books are not admissible evidence for him, in a suit on an account, except by the defendant's consent; nor, conceding their admissibility, would they be higher or better evidence than the positive testimony of his clerk, who swears to the sale and delivery of the articles, although he cannot recollect their dates, and has never compared the account with the books.—Godbold v. Blair & Co. . . . . 592
26. *Merchant's clerk may testify to what facts.*—A merchant's clerk and book-keeper, who testifies that he made all the entries on the books,



## EVIDENCE—CONTINUED.

and that he charged nothing as sold which was not sold, may further testify "that he is satisfied and believes that all the items charged in the defendant's account were sold, though he cannot recollect them."

Wright v. Bolling ..... 259

## VI. PAROL, WHEN ADMISSIBLE TO AFFECT WRITTEN.

27. *To explain illegible figures in record.*—Where the date of an attachment is illegible, two figures having apparently been written and blended together, the testimony of the clerk who issued the writ is admissible, in connection with it, to show that the wrong date had been first written by the attorney, and that he had corrected it.—Goldsmith, Forcheimer & Co. v. Picard ..... 142
28. *Covenant cannot be varied by parol.*—The legal effect of a covenant cannot be varied by a parol contemporaneous agreement; as where a vendee, with covenants of warranty, agrees by parol to pay an outstanding incumbrance.—Holley v. Younge ..... 204
29. *Admissibility of parol evidence as to facts dehors written.*—In a suit on a promissory note by the payee against a surety, who signed as co-maker with his principal, the defendant introduced evidence, to show a partial failure of consideration, that the note was given for the amount of a book account due from his principal to plaintiff, which was secured by a mortgage purporting on its face to secure the amount of the debt then due; that after the execution of the note and mortgage, the amount of this debt became a material question in a certain suit, in which plaintiff was examined as a witness; and that on his examination as a witness in said suit, he could only prove a portion of the items embraced in the account: *Held*, that plaintiff might rebut this evidence, by making proof of other items in the account for articles sold after the execution of the mortgage, but before the date of the note; and that such proof did not tend to vary or affect the terms of the mortgage, since the question at issue was whether the note was supported by a consideration, and not whether the mortgage operated prospectively or only secured the existing indebtedness.—Wright v. Bolling ..... 259
30. *Parol evidence inadmissible to supply omission in written will.*—There is no legal principle more firmly established by the uniform and constant decisions of judicial tribunals, than the rule which declares that an omission in a written will cannot be supplied by parol.—Abercrombie's Ex'r v. Abercrombie's Heirs ..... 489
31. *Admissibility of parol evidence to prove absolute deed a trust.*—It is the settled law of this State, that parol evidence is admissible to show that a deed, absolute on its face, was received in trust for a particular purpose, and that the vendee was a mere conduit for passing the title.—Edmondson v. Welsh and Wife ..... 578
32. *Objections to parol evidence, on the ground that it tended to vary the legal effect of a sale under execution, considered and overruled.*—Garrett's Adm'rs v. Garrett & Garrett ..... 687

## VII. RELEVANCY AND ADMISSIBILITY GENERALLY.

33. *To show defendant's instrumentality in the levy of attachment.*—Evidence of the fact that one of the defendants agreed, if another creditor (whose attachment was first in the hands of the sheriff) would yield the prefer-



EVIDENCE—CONTINUED.

- ence to their attachment, that he would find property belonging to the plaintiff on which the attachment might be levied, and on which it was subsequently levied, is relevant and admissible for the plaintiff, as tending to show that said defendant was instrumental and active in causing the attachment to be levied; and being admissible for this purpose, its admission by the court for another purpose is not a reversible error. *Goldsmith, Forcheimer & Co. v. Picard*. . . . . 142
34. *Prior attachment, sued out by another creditor, and levied on the same goods.* Although the defendants, who are sued as partners, cannot be held responsible for the separate act of one partner in procuring the levy of another attachment in favor of another creditor; yet where the attachment on which the action is founded, by the sheriff's return thereon endorsed, shows that the goods had been first taken under the other attachment, the plaintiff may show that the goods levied on were more than sufficient to satisfy that attachment, and may introduce the attachment and levy for this purpose. . . . . 142
35. *Evidence of plaintiff's general credit and reputation, when admissible.*—Evidence of the plaintiff's general credit and reputation, it seems, is not admissible for him in case to recover damages for the wrongful and vexatious suing out of an attachment, until it has been assailed; but where the record shows that his general reputation was put in issue by the evidence, he may offer evidence to sustain it. . . . . 142
36. *Endorsement of levy on fi. fa. admissible evidence against claimant.*—The sheriff's endorsement on a *fi. fa.* of his levy is admissible evidence against the claimant, on a trial of the right of property, for the purpose of showing its levy on the slave in controversy.—*Thomas v. Henderson*. . . . . 523
37. *Act tending to show negligence may be proved to have been done under advice of physician.*—Where the plaintiff introduces evidence of an act tending to show negligence in the treatment of the slave—*e. g.*, his removal by railroad, while sick—the defendant has the right to prove that he acted under the advice of a physician. . . . . 535
38. *Evidence of value at time and place of sale.*—Where cotton, bought by sample in Montgomery, Alabama, in January, was shipped to New Orleans, and there re-sold at public auction in May, after notice to the vendor, the price brought at the re-sale may be looked to by the jury in determining the actual value in Montgomery at the time of the sale, when the other evidence in the cause shows the value of the sampled cotton in Montgomery at the time of sale, in New Orleans at the time of re-sale, and that the relative value of the sampled and damaged cotton was the same in both places.—*Foster v. Rodgers*. . . . . 602
39. *Evidence held relevant and corroborative.*—Where two witnesses testify to a payment of money,—one stating that it was made before the commencement of the action, and the other not specifying the time at all, the testimony of the latter cannot be rejected as irrelevant, but must be regarded as corroborative of the former.—*Garrett's Adm'rs v. Garrett & Garrett*. . . . . 687
40. *Opinion of witness inadmissible.*—In an action to recover damages for shooting a dog, a witness cannot be asked, "whether, from his knowledge of the dog, he did or did not consider him a nuisance."—*Parker v. Mise*. . . . . 480

## EVIDENCE—CONTINUED.

## VIII. BURDEN—WEIGHT—SUFFICIENCY.

41. *Circumstantial evidence in criminal cases.*—To warrant a conviction in criminal cases upon circumstantial evidence only, where the circumstances are inconclusive in their character—*i. e.* such that, admitting all they tend to prove, the guilt of the accused is still left wholly uncertain, or dependent upon some definite probability—they must be so multiplied as to increase the probability to an indefinite extent beyond the reach of mere calculation; but this principle does not apply to circumstances of a conclusive character, and therefore, before the appellate court can determine that the primary court erred in refusing a charge which asserted the principle generally, the record must show that the evidence was confined to facts entirely inconclusive in their tendency. The true test is, not whether the circumstances proved produce as full conviction as the positive testimony of a single credible witness, but whether they produce moral conviction to the exclusion of every reasonable doubt.—*Mickle v. The State.*..... 20
42. *Preponderance of evidence in civil cases.*—In the absence of legal presumptions, it is for the jury alone to determine what amount of evidence is required to produce conviction in their minds; and a charge, which instructs them “that, in civil cases, all that is required is that the proof shall preponderate in favor of one party or the other, and that they must find according to the preponderance of the proof,” invades their province, and is therefore erroneous.—*Mays v. Williams.*..... 267
43. *Distinction between positive and negative testimony.*—Where one witness swears that, in a certain conversation, he heard a party use particular language, while another, who was present at the same time, testifies that he did not hear it, the law gives more weight to the positive than to the negative testimony; but this principle does not apply, where one witness testifies that the conversation had reference to a particular slave in controversy, while the other testifies that it did not relate to her, but to another slave, and each swears that he heard and remembers the whole conversation.—*Harris v. Bell et al.*..... 520
44. *Sufficiency of evidence to authorize recovery.*—Positive certainty is not ordinarily attainable in actions on open accounts: If the jury are reasonably satisfied from the evidence of the existence of the facts which constitute the alleged indebtedness, it is sufficient to authorize a recovery by the plaintiff.—*Godbold v. Blair & Co.*..... 592

## IX. OBJECTIONS, WHEN AND HOW MADE.

45. *Specific objection necessary.*—If a party wishes to object to the testimony of a witness, on the ground that his evidence shows that he is not qualified to testify to the fact in question, he must make a specific objection to it on that ground.—*Goldsmith, Forchheimer & Co. v. Picard.*..... 142
46. *Motion to admit or exclude evidence, of which part is legal and part illegal.* Plaintiff having offered a deposition in evidence defendant moved to exclude the answer to the third interrogatory, which contained some legal and some illegal evidence; “and thereupon the court excluded all and every part of said evidence from the jury, and plaintiff excepted”: *Held*, that the action of the court was not erroneous.—*Hiscox v. Hendree.*..... 216

EVIDENCE—CONTINUED.

47. *General objection to evidence, of which part is legal.*—A general objection to evidence as a whole, when a part of it is legal, may be overruled.  
Martin v. Hardesty..... 458  
Thomas v. Henderson..... 523  
Garrett's Adm'rs v. Garrett & Garrett..... 687
48. *Waiver of objection to secondary though primary is not produced.*—When a party elicits, on cross-examination of a witness, parol evidence of judicial proceedings, which constitutes new matter and is directly responsive to the interrogatory, and afterwards declines to read the answers to the cross-interrogatories on the trial, he cannot, when his adversary offers to read them, raise the objection that the record was not produced nor its absence accounted for; and that the evidence thus elicited is also incidentally stated by the witness in answer to a direct interrogatory, does not affect the principle.—Thomas v. Henderson..... 523
49. *Demurrer to evidence.*—When a demurrer is interposed to evidence ad-  
duced in support of a plea, the defendant may be compelled to join in  
it; and if the evidence is insufficient to support the plea, judgment  
should be rendered for the plaintiff.—Williams v. McConico..... 572
50. *General objection to evidence, of which part is legal.*—Where two depositions  
are offered in evidence, and are objected to "on the ground that no in-  
terrogatories, cross-interrogatories, or commissions issued to take the  
testimony of said witnesses or either of them", the entire objection may  
be overruled if either deposition is unobjectionable.—Thomas v. DeGraffen-  
reid..... 651
51. *Specific objection to evidence waives other objections.*—An objection to evi-  
dence on a single specified ground is a waiver of all other objections  
to it.—Garrett's Adm'rs v. Garrett & Garrett..... 687

EXCEPTIONS, BILL OF.

1. *Construed most strongly against appellant, and in favor of ruling of primary court.*—In an action on an open account for work done, defendant proved an agreement, made "in the spring of 1852", that goods to be furnished by him to plaintiff's sons, who were over twenty-one years of age, should be received in payment on plaintiff's account for the work then being done; and his accounts against the sons, "for goods furnished in 1852", were also produced and proved, but were not set out in the record. The court ruled out these accounts, and the defendant excepted: *Held*, that it would be presumed, on error, that some of the items in the accounts were for goods furnished to the sons before the making of the agreement proved, since this construction would support the ruling of the primary court.—Nash & Robinson v. Shrader, 377

EXECUTIONS.

1. *Fi. fa. issued after defendant's death void.*—A *fi. fa.* issued after the defend-  
ant's death, without a revival of the judgment, is void, except when  
issued to continue a lien acquired by a previous valid *fi. fa.*—Collier's  
Adm'r v. Windham..... 291
2. *Bond of indemnity to procure levy of void execution, itself void.*—A bond of in-  
demnity given to induce a sheriff to levy a void execution, is itself void,  
and cannot be enforced by suit..... 291



## EXECUTIONS—CONTINUED.

3. *Fi. fa. issued within what time to preserve lien.*—Under the statute regulating the practice in the common-law courts of Mobile, which provides (Pamphlet Acts 1853-4, p. 92, § 10) that “the lien acquired by any execution issuing from either of said courts shall not be lost, if *alias* executions issue to the sheriff *without interval of more than ninety days*”, an original execution was returned on the 14th April, and an *alias* was issued on the 14th July next thereafter: *Held*, that the lien was not lost.—*Lang v. Phillips*. . . . . 311
4. *Fi. fa. on void delivery bond amendable.*—A *fi. fa.*, issued on a void delivery bond, against the defendants in the judgment and their surety on the bond, if it correctly describes the judgment, by its date, amount, and names of parties, is neither void nor voidable as to the defendants in the judgment, but may be amended by striking out the name of their surety on the bond.—*DeLoach v. The State Bank*. . . . . 437
5. *Endorsement of levy on fi. fa. admissible evidence against claimant.*—The sheriff’s endorsement on a *fi. fa.* of his levy is admissible evidence against the claimant, on a trial of the right of property, for the purpose of showing its levy on the slave in controversy.—*Thomas v. Henderson*. . . . . 523

## EXECUTORS AND ADMINISTRATORS.

1. *Administrator’s duties and liabilities—Resulting trusts in lands purchased by him with funds of the estate and re-sold at a profit.*—An administrator is bound not to do anything which has a tendency to interfere with his duty in discharging the trust. His office is not conferred on him for the purpose of enabling him successfully to engage in intrigues for his private benefit. If he purchases land, or other property, with the money of the estate, and afterwards re-sells it at a profit, the benefit of the purchase enures to the estate, and not to himself individually.—*Mosely et al. v. Lane*. . . . . 62
2. *Estopped by his conduct from denying that the purchase was made with funds of the estate.*—Where an administrator agrees with his co-administrator that they will buy certain lands for the estate at the Government land sales, and in compliance with that agreement procures him to join in raising funds for that purpose, and charges the estate with the expense of raising those funds; and prevents his co-administrator and the only adult son of the decedent from attending the sales, by assuring them that he will buy the lands for the estate, and at the sales prevents other persons from bidding for them, by declaring that he had come there expressly to buy them for the estate: and by these means, and with these funds, buys the lands for a sum greatly below what he would otherwise have had to pay for them, and takes the title in his own name, and soon afterwards re-sells them for a large profit,—he is estopped in equity, as against those representing the estate, from denying that the funds belonged to the estate. (*Chilton, C. J., dissenting.*) . . . . . 62
3. *Executor’s assent to legacy, and its effect.*—If a life estate in a slave is bequeathed to one person, with a vested remainder to another, the assent of the executor to the legacy of the particular estate is an assent to the remainder, and renders the interest of the remainder-man, which was previously equitable and inchoate, a complete legal interest.—*Gibson v. Land*. . . . . 117



EXECUTORS AND ADMINISTRATORS—CONTINUED.

4. *Administrator de bonis non cannot be appointed until office vacated by predecessor.*  
After the grant of letters of administration to a person entitled to and capable of discharging the trust, the probate court has no power to make any new appointment to the office until it is vacated, either temporarily or permanently, by the death, resignation, removal, &c., of the first administrator: such new appointment before the office is vacated, is totally void, and confers no authority on the person appointed to have the first administrator cited to make final settlement.—*Matthews v. Douthitt and Wife*. . . . . 273
5. *Final decree, rendered within eighteen months after grant of letters, and discharging administrator from further liability, void.*—If an administrator, after qualifying under a regular appointment by the probate court, has never resigned, and has not reported the estate either solvent or insolvent, a final decree, rendered within eighteen months after his appointment, that he “go hence discharged from further liability as such administrator,” is utterly void—it neither affects his rights or liabilities as administrator, nor authorizes the appointment of an administrator *de bonis non* of the estate. . . . . 273
6. *Whether such decree is of any validity as confirming and allowing administrator's accounts.*—Such a decree, if admitted to be valid so far as it confirms and allows the administrator's accounts (as to which, *quære*?) cannot be conclusive beyond the very items mentioned in the account, nor protect the administrator from liability as to all other matters. . . . . 273
7. *Bequest to executor in trust enures to next of kin on failure of trust.*—Where property is bequeathed to an executor in trust for a specific object, which fails or is declared invalid, he takes no personal interest in it, but a resulting trust then arises in favor of the next of kin.—*Abercrombie's Ex'r v. Abercrombie's Heirs*. . . . . 489
8. *What disqualifies widow from administering on her husband's estate.*—A widow is entitled to administer on her husband's estate, unless disqualified by some one of the causes specified in section 1658 of the Code; but the fact that she had separated and was living apart from him at the time of his death, and entertained feelings of hostility towards him, does not disqualify her.—*Williams v. McConico*. . . . . 572
9. *Widow's right to administer.*—A widow is entitled to administer on the estate of her deceased husband, if, being competent in law, she makes application within forty days after his death is known, unless she relinquishes her right in one of the modes specified in the statute (Code, §§ 1662, 1674): a recital in an order of court, granting letters of administration to other persons, that it is “made known to the court, by A. B., special attorney of said widow, that she relinquishes her right of administration to the applicants”, does not debar her from applying for letters before the expiration of the forty days.—*Dunham v. Roberts*. . . . . 701
10. *Conclusiveness of order granting letters of administration.*—A grant of letters of administration to a third person, on an *ex parte* application, does not preclude the widow from asserting her right by petition to the court, asking the revocation of the former letters, and the grant of letters to herself. The provisions of the Code (§ 1696), specifying the causes for which an administrator may be removed, do not apply to such a case. . . . . 701

## FRAUDS, STATUTE OF.

1. *Services performed under void (because parol) contract recoverable at law.*—Although an action at law cannot be maintained for the breach of a contract which is void under the statute of frauds because not reduced to writing, yet a recovery at law may be had for services performed under it.—*Sims v. McEwen's Admr.* . . . . . 184
2. *Charge, respecting the effect of three years' possession of personal property, under statute of frauds, held correct.*—*Rowan v. Hutchisson.* 429
3. *Deed void as to third persons, good between parties.*—A deed which is fraudulent and void as to creditors whose debts are delayed, is nevertheless valid as between the parties themselves, and neither can set up the fraud to avoid it.—*Wiley, Banks & Co. v. Knight.* . . . . . 336
4. *Statute does not apply to resulting trusts.*—The statute of frauds has no application to trusts created by operation of law alone, which may always be established by parol, except where some rule of evidence prevents it. *Caple et al. v. McCollum.* . . . . . 461
5. *Fraudulent contract cannot be established in equity.*—Equity will not interfere to declare a contract, which is on its face an absolute sale, to be a trust or mortgage, when the evidence shows that the transaction was intended to defraud the vendor's creditors. *In pari delicto, potior est conditio possidentis.*—*Brantley v. West.* . . . . . 542
6. *When statute of frauds will not prevent recovery for money had and received under executed parol contract.*—Conceding that a purchase of lands at execution sale, under a parol agreement with the defendant in execution to purchase for his benefit, will enure to the benefit of the purchaser himself, under the operation of the statute of frauds; yet, if the purchaser re-sells the lands, taking a note for the purchase money, and places this note in the hands of a third person for the benefit of the defendant, the latter may maintain an action for money had and received, to recover its proceeds when collected, and the statute of frauds is no defence to the action.—*Garrett's Admr's v. Garrett & Garrett.* . . 687

## GAMING.

1. *Room in second story, rented and occupied as sleeping apartment, not necessarily within prohibition of statute, because lower story is used by another for sale of spirituous liquors.*—A room on the second floor of a two-storied house, rented and occupied by the defendant as a sleeping apartment, is not brought within the prohibition of the statute, by the mere fact that the lower story is used by another person for the sale of spirituous liquors.—*Dale and Underwood v. The State.* . . . . . 31
2. *Country store-house is a public house, and prima facie da. entirely.*—A store-house in the country is a public house, within the meaning of the statute against gaming. (Code, § 3243); and if it consists of two rooms, one above the other, and the owner controls both, while he uses the lower room as his store, the upper room also is within the prohibition of the statute, unless it affirmatively appears that it is not used as an appendage to the store, nor in the prosecution of its business, nor in connection with the store for the convenience and accommodation of the owner, his employees or customers, but is occupied for some justifiable private purpose, entirely disconnected from the business of the store, or the convenience of the customers.—*Brown v. The State.* . . . . 47

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GIFT, DEEDS OF.

1. *'Heirs of the body' held limited by 'die leaving' to issue living at death of first taker, and reversion supported.*—A deed of gift was in these words: "I give, grant, and confirm unto my daughter Eliza a negro girl, named Perse, to have, hold, and enjoy said property and her increase during the natural life of my said daughter, which property, at her death, shall descend to the natural heirs of her body; provided always, and upon this condition, and it is the true intent and meaning of these presents, that in case my said daughter *die leaving no natural heirs of her body*, then, and in that case, said property shall revert back and form part of my estate": *Held*, on the authority of *Bell and Wife v. Hogan*, 1 Stew. 536, that Eliza took only an estate for life, and not the absolute interest; that the words '*die leaving*' limited the words '*heirs of her body*' to issue living at the death of the first taker; and that on her death, leaving no issue, the grantor's personal representative might recover the property.—*McVay's Adm'r v. Hams*. . . . . 238
2. *Settled rule of property binding on courts.*—When a rule of property has been settled by judicial decision, and may reasonably be supposed to have entered into the business transactions of the country, it is the duty of the courts to adhere to it, and to leave the corrective to the legislature. . . . . 238

GUARDIAN AND WARD.

1. *Guardian's power, if unrestrained by statute, over ward's personal estate.* A guardian has power, if not restrained by statute, to sell his ward's personal estate without an order of court, and his sale will convey a good title to a *bona fide* purchaser; and therefore, if a guardian, appointed in Tennessee, sells his ward's slave in this State to a *bona fide* purchaser, and infant cannot recover him without making proof of the statute law of Tennessee.—*Woodward v. Donally*. . . . . 198
2. *His liability for torts of ward.*—If a guardian hires out his ward's slaves, and afterwards deprives the hirer of their services during the term, by harboring them when run away, he is guilty of a breach of contract: but to make him responsible for the act of his ward in harboring the slave, he must be in some way connected with it, and it must be shown to have been done by his directions, or with his assent; it is not sufficient to show that he had previously allowed his ward to make contracts in relation to his own property, and had refused to entertain a proposition to rescind the contract until he had consulted his ward. *Camp v. Dill*. . . . . 553

HUSBAND AND WIFE.

1. *Husband may maintain detinue in his own name, without joining wife, to recover slave in which she has vested remainder, after termination of life estate.*—If a slave is bequeathed to one person for life, with a vested remainder to an unmarried woman, who subsequently, (and after the slave has gone into the possession of the first taker with the executor's assent) marries, her husband may, after the termination of the



## HUSBAND AND WIFE—CONTINUED.

- life estate, maintain detainee in his own name, without joining his wife, against a purchaser from the person having the particular estate; *Chilton, C. J.*, and *Goldthwaite, J.*, resting the decision on the ground, that marriage vests in the husband the absolute interest in all the wife's personal chattels which she has in actual possession, and the right to recover by suit her personal chattels held adversely by others; and *Rice, J.*, holding that the absolute title was vested in him.—*Gibson v. Land* ..... 117
2. *Husband, as trustee, may interpose a claim at law.*—If no trustee is provided for in the marriage settlement, the legal title to the separate estate of the wife is necessarily vested in the husband, if he reduces the property into possession; and having the legal right, he may interpose a claim at law, when her property is levied on, and try the right of property.—*Gerald and Wife v. McKenzie* ..... 166
3. *But wife cannot compel him to interpose, and may therefore come into equity.*—But, although the husband, in such case, may assert his legal title at law, yet the wife cannot compel him to do so, and for this reason she may at once apply to a court of equity for the protection of her rights .... 166
4. *Provisions of Code (§ 2131) apply only to separate estates created by law.*—Section 2131 of the Code, which authorizes the wife to sue alone when the suit relates to her separate estate, applies only to separate estates created by statute, and not to those which were created by the act of the parties before the existence of the statute. .... 166
5. *Bill filed by husband and wife held her bill alone.*—When a bill, which is filed in the name of husband and wife, concerns only the separate estate of the wife, seeks only to establish and protect her rights and interests, and asks no relief for or against her husband, it will be regarded as the bill of the wife alone, and the husband will be considered only her trustee or next friend ..... 166
6. *What is cruelty on part of husband.*—Cruelty, where it does not affect life, limb, or health, is frequently a relative term, whose meaning must be determined by the particular circumstances of each case: between persons of education, refinement, and delicacy, the slightest blow in anger might be cruelty, while between persons of a different character and walk in life, it might not mar to any great extent their conjugal relations, nor materially interfere with their happiness.—*David v. David*. 222
7. *How affected by provocation on part of wife.*—If the evidence shows that the wife, by her own misconduct, has brought upon herself the ill-treatment of which she complains, and which is not wholly disproportioned to the provocation, she is required to make out a much stronger case for relief than when her own conduct has been entirely blameless; and on this ground a divorce was refused in this case. .... 222
8. *Alimony pending suit for divorce.*—The wife has a right to a support out of her husband's estate, pending a suit for divorce against him, and also to such sum as is necessary to procure solicitors to conduct the suit for her; and when this right is denied by the chancellor at any time before permanent alimony is finally set apart to her, a *warrant* will be awarded from the Supreme Court, to compel him to make the necessary order, as there is no other adequate and specific remedy.—*Ex parte King*. . . 387
9. *Code (§ 2131) inapplicable to separate estates created by will.*—Section 2131 of



## HUSBAND AND WIFE—CONTINUED.

- the Code, which requires the wife to sue alone when the suit relates to her separate estate, does not apply to separate estates created by will before the adoption of the Code.—*Friend v. Oliver* ..... 532
10. *When husband must sue alone for wife's separate estate.*—Where a separate estate in a married woman was created by will before the adoption of the Code, and no trustee was appointed, the legal title passed to the husband, and he alone had the right to sue for the recovery of the property ..... 532
11. *What disqualifies widow from administering on her husband's estate.*—A widow is entitled to administer on her husband's estate, unless disqualified by some one of the causes specified in section 1658 of the Code; but the fact that she had separated and was living apart from him at the time of his death, and entertained feelings of hostility towards him, does not disqualify her.—*Williams v. McConico*..... 572
12. *What seizin of husband gives right to dower.*—To entitle the widow to dower in lands of which her husband was seized during the coverture, he must have been beneficially seized, though but for a moment, to his own use, and not as a mere conduit for passing the title.—*Edmondson v. Welsh and Wife* ..... 578
13. *Widow's right to administer.*—A widow is entitled to administer on the estate of her deceased husband, if, being competent in law, she makes application within forty days after his death is known, unless she relinquishes her right in one of the modes specified in the statute (Code, §§ 1662, 1674): a recital in an order of court, granting letters of administration to other persons, that it is "made known to the court, by A. B., special attorney of said widow, that she relinquishes her right of administration to the applicants", does not debar her from applying for letters before the expiration of the forty days.—*Dunham v. Roberts*.. 701

## INDICTMENTS.

See CRIMINAL LAW.

## INFANTS.

1. *Appeal by infant must be sued out by guardian or next friend.*—When the appellant is an infant, the appeal must be sued out by his guardian, or next friend, who may either give bond to supersede the judgment, or security for the costs of appeal; and where (as in this case) the appeal is sued out by the infant in his own name, and errors are assigned by attorney, on the fact of such infancy being brought to the knowledge of the court by affidavits, the appeal will be dismissed on motion.—*Cook v. Adams*..... 294

## INSOLVENT DEBTORS.

1. *Insolvent laws of Georgia construed, and held no defence to action for recovery of property omitted from schedule.*—Under the insolvent laws of Georgia, as shown in evidence in this case, the insolvent debtor is not divested of his title to property omitted from his schedule; and although such property may be subjected to the satisfaction of his debts, yet his debtor cannot take advantage of the omission to defeat a subsequent action for the recovery of the property.—*Garrett's Adm'rs v. Garrett & Garrett*. 687

## INSOLVENT ESTATES.

1. *Report of insolvency, when apparent from recitals of record, and in collateral proceeding, unnecessary.*—Although the proceedings of the orphans' court in the settlement of an insolvent estate, when the record does not show a report of insolvency by the personal representative, are liable to be reversed on error; yet, in a collateral proceeding, (as where a creditor, whose claim is allowed against the estate, comes into equity against the decedent's fraudulent grantee,) the recitals of the record, showing that such a report was made, are sufficient.—*Heydenfeldt v. Towns et al.*... 423
2. *Decree ascertaining claim against insolvent estate prima facie evidence against intestate's fraudulent grantee.*—Conceding that a judgment against the personal representative, rendered according to the course of the common law, is not evidence against the heir or devisee, so as to charge the decedent's lands; yet, under the statutes of this State in reference to insolvent estates, the action of the orphans' or probate court, in ascertaining the amount of the decedent's indebtedness, binds the real estate equally with the personalty, and, if not conclusive, is at least *prima facie* evidence against all parties interested in the estate, and against a fraudulent grantee of the decedent..... 423
3. *When and by whom objection may be raised to payment of partnership debt out of estate of deceased partner.*—After a claim against an insolvent estate has been allowed without objection, and the time within which objections are required to be made has expired, the administrator may still move to postpone its payment until after the separate debts shall have been satisfied, on the ground that it is a partnership debt, which is not entitled to share equally with separate debts.—*Bridge & Co. v. McCullough's Adm'r* ..... 661
4. *Insufficiency of affidavit.*—When a claim against an insolvent estate is verified by the affidavit (not of the creditor, but) of a third person, who swears that the claim, "to the best of his knowledge, information, and belief, is yet due and unpaid", but does not state that he has any knowledge of its correctness or that it is due,—the affidavit is not sufficient, and the claim should be rejected—Code, § 1847.—*Pickle's Adm'r v. Ezzell* ..... 623

## INSURANCE.

1. *Custom affects policy.*—Every usage of trade which is so well settled, or so generally known, that all persons engaged in that trade may fairly be considered as contracting with reference to it, is regarded as forming part of every policy designed to protect risks in that trade, unless by the express terms of the policy, or by necessary implication, such inference is repelled.—*Mobile Marine Dock & Mutual Insurance Co. v. McMillan & Son.*..... 77
2. *General rules for construction of policies.*—The same rules of construction by which the sense and meaning of all other instruments are determined, apply equally to policies of insurance; yet policies are to be construed liberally for the benefit of the assured, and if any doubt should arise upon the meaning of the whole instrument, greater effect should be allowed to the written than to the printed words ..... 77
3. *Difference between contracts of insurer and carrier.*—The contract of the insurer is not necessarily co-extensive with that of the carrier by whom

## INSURANCE—CONTINUED.

- the goods are transported, and it is therefore erroneous to hold him liable until the goods are delivered to the consignee, or to some one for him, or are landed at the place where it is usual for him to receive goods. The carrier, by the terms of his contract, or by force of a custom, may be liable for the overland transportation of the goods, after they shall have been landed at the accustomed port of destination, to the place where the consignee usually receives goods, or until delivered to him; while the risk of a marine policy is at end, in the absence of express stipulations to the contrary, whenever the goods can be considered safely landed according to the usual course of business, at the accustomed port of destination, although they may never have been delivered to the consignee. . . . . 77
4. *Port of New Orleans, in marine policy, means usual place of landing goods on wharf at Lake Pontchartrain.*—A marine policy was effected on a lot of cotton, shipped from Mobile to New Orleans, on board of a vessel which did not go to the city of New Orleans, but always discharged her cargo at the wharf on Lake Pontchartrain; and the stipulation of the policy was, that the risk should continue "until the said goods shall be safely landed at the port of New Orleans": *Held*, that the risk terminated with the safe landing of the goods at the wharf on Lake Pontchartrain. . . . 77
5. *Policy held a severable contract.*—A policy of insurance upon 198 bales of cotton, valued at \$9,900, at a premium of three-sixteenths, is so far a severable contract, that the underwriters are discharged from liability for whatever portion is safely landed at the port of destination. . . . . 77

## JUDGMENTS AND DECREES.

1. *Lien of judgment not lost by laches.*—The lien of a judgment which has not become dormant is not lost or impaired by laches in issuing execution. *De Vendell v. Doe ex dem. Hamilton.* . . . . . 156
2. *Final decree, rendered within eighteen months after grant of letters, and discharging administrator from further liability, void.*—If an administrator, after qualifying under a regular appointment by the probate court, has never resigned, and has not reported the estate either solvent or insolvent, a final decree, rendered within eighteen months after his appointment, that he "go hence discharged from further liability as such administrator," is utterly void—it neither affects his rights or liabilities as administrator, nor authorizes the appointment of an administrator *de bonis non* of the estate.—*Matthews v. Douthitt and Wife.* . . . . . 273
3. *Whether such decree is of any validity as confirming and allowing administrator's accounts.*—Such a decree, if admitted to be valid so far as it confirms and allows the administrator's accounts (as to which, *quare*?) cannot be conclusive beyond the very items mentioned in the account, nor protect the administrator from liability as to all other matters . . . . . 273
4. *Final settlement, when attacked for fraud, not opened on proof of errors or mistakes.*—A decree of the orphans court, rendered on the final settlement of an administrator's accounts, previous to the act of 1850, conferring jurisdiction on chancery to overhaul such decrees, will not be opened in equity, when impeached for fraud, on proof of an error or mistake in the allowance of a credit for money paid to a guardian after the revo-



## JUDGMENTS AND DECREES—CONTINUED.

- cation of his letters of guardianship; it being shown that the complainant, then an infant, was represented on the settlement by a guardian *ad litem*; that the payment was made in good faith, for the ward's accommodation, and in accordance with her wishes at the time; and it not appearing that the facts were concealed from the court.—*Cowan and Wife v. Jones*. . . . . 317
5. *Invalidity of Georgia judgment establishing lost note*.—A summary judgment rendered under the statute of Georgia giving the Superior Court "power and authority to establish copies of lost papers", &c., under such rules and precautions as may be customary and according to law and equity", will be held void in the courts of this State for want of jurisdiction of the person, when the record does not show the statute authorizing the court to proceed without notice.—*Foster v. Glazener*. . . . . 391
6. *Plea to jurisdiction of foreign court*.—Ordinarily, in debt on a foreign judgment, a plea, averring that the defendant was without the jurisdiction of the court and had no notice, should also allege that he did not, either in person or by attorney, appear to the action; but this rule only applies to cases in which the record shows that the court had jurisdiction of the person; and where this does not appear, the defendant may, under the general issue, show that the court had no jurisdiction. . . . 391
7. *Decree ascertaining claim against insolvent estate prima facie evidence against intestate's fraudulent grantee*.—Conceding that a judgment against the personal representative, rendered according to the course of the common law, is not evidence against the heir or devisee, so as to charge the decedent's lands; yet, under the statutes of this State in reference to insolvent estates, the action of the orphans' or probate court, in ascertaining the amount of the decedent's indebtedness, binds the real estate equally with the personalty, and, if not conclusive, is at least *prima facie* evidence against all parties interested in the estate, and against a fraudulent grantee of the decedent.—*Heydenfeldt v. Towns et al.*. . . . 423
8. *Validity of judicial proceedings had before interested judge*.—The general rule, that it is irregular and improper for a judge to try any cause in which he has such an interest as would disqualify him as a witness, does not apply to orders purely formal in their character, and it is doubtful whether it extends to a case in which no other judge could try and determine the cause. If the judge is deprived of authority to act by statutory inhibition, the proceedings are void; otherwise, voidable only, and therefore valid until avoided. . . . . 423
9. *Motion to render final decree nunc pro tunc, and evidence held insufficient*. An entry, made by a judge of probate on his trial docket, in these words, "Estate of Solomon Perkins, dec'd. Final settlement—Settlement made", in connection with memoranda endorsed on the executors' account current, and the parol evidence of the judge that he had pronounced an oral decree in conformity with the memoranda, is insufficient to authorize the rendition of a final decree at a subsequent term *nunc pro tunc*.—*Perkins v. Perkins*. . . . . 479
10. *Conclusiveness of final decree of probate court*.—A decree of the probate court, rendered on the final settlement of an estate, ascertaining and adjudging to each distributee his share of the estate, is as final and conclusive as a decree in chancery or a judgment at law; and after



JUDGMENTS AND DECREES—CONTINUED.

- the expiration of the term at which it is rendered, a motion to enter satisfaction, and to quash an execution issued on it, upon grounds which go only to matters behind the decree, cannot be granted, although such matters may be true in point of fact.—*Watson v. Hutto*..... 513
11. *Conclusiveness of former adjudication revoking probate of will.*—Where a nuncupative will, admitted to probate without due notice to those entitled to it, is afterwards declared null and void by a decree of the same court on their petition, and an administrator of the estate appointed; and this decree is afterwards affirmed on error, on appeal sued out by the person to whom the property was bequeathed by the will, he is barred from prosecuting another petition in the same court for the re-probate of the will.—*Bradley v. Address*..... 596
12. *How judgment of sister State must be pleaded.*—In pleading the judgment of a sister State, to which “full faith and credit” are to be given (U. S. Constitution, Art. IV, § 1), it is not necessary to set out affirmatively the facts upon which the power and authority of the court by which it was pronounced depended.—*Gunn v. Howell*..... 663
13. *Judicial ascertainment of jurisdictional fact.*—Where the jurisdiction of the court to proceed in the summary mode provided by the statute depends upon the existence of a preliminary fact, as where an execution, with a return of “no property,” is required before process of garnishment can issue, the record must affirmatively show either the existence of the fact itself, or that the court determined its existence; but if the court erroneously determine that the fact does exist, its actual existence cannot be collaterally inquired into, and the error does not affect the validity of the proceedings..... 663
14. *Conclusiveness of judgment on trial of right of property.*—If the claimant recover judgment on verdict against the plaintiff in attachment, on a trial of the right of property under the statute, and afterwards bring an action for damages against him, the judgment on the trial of the claim suit is conclusive on the point that the defendant in attachment had no interest in the property.—*Roberts v. Heim*..... 678
15. *Conclusiveness of order granting letters of administration.*—A grant of letters of administration to a third person, on an *ex parte* application, does not preclude the widow from asserting her right by petition to the court, asking the revocation of the former letters, and the grant of letters to herself. The provisions of the Code (§ 1696), specifying the causes for which an administrator may be removed, do not apply to such a case.—*Dunham v. Roberts*..... 701

JURISDICTION.

1. *Administrator de bonis non cannot be appointed until office vacated by predecessor.* After the grant of letters of administration to a person entitled to and capable of discharging the trust, the probate court has no power to make any new appointment to the office until it is vacated, either temporarily or permanently, by the death, resignation, removal, &c., of the first administrator: such new appointment before the office is vacated, is totally void, and confers no authority on the person appointed to have the first administrator cited to make final settlement.—*Matthews v. Douthitt and Wife*..... 273

## JURISDICTION—CONTINUED.

2. *Jurisdiction of chancellor, pending appeal from final decree granting divorce a vinculo, to allow temporary alimony.*—On bill filed by the wife, asking a divorce *a vinculo*, an interlocutory order was made for the allowance of temporary alimony, and on final hearing a decree was rendered in her favor: a reference to the master was also made, to ascertain and report the value of the defendant's estate, and it was further ordered that the cause "be retained in court for further orders"; and from this decree, before the report came in, the defendant took an appeal: *Held*, that the chancellor, notwithstanding the suing out and pendency of the appeal, had jurisdiction to grant an order, on the petition of the wife showing a necessity for it, to secure the prompt payment of the quarterly allowances made by the previous interlocutory decree, and to require the defendant to pay the complainant's solicitors such further sum as might be a reasonable compensation for their services in defending the appeal.—*Ex parte King* ..... 387
3. *Law of nations as to assumption of extra-territorial jurisdiction.*—It is a well-settled principle of international law, that every attempt on the part of one nation or state, by its legislation, to grant jurisdiction to its courts over persons or property not within its territory, is regarded elsewhere as mere usurpation; and all judicial proceedings, in virtue of it, are held utterly void for every purpose.—*Foster v. Glazener* ..... 391
4. *Courts of general jurisdiction, as to summary proceedings, held limited and special.*—Although every reasonable intendment is to be made in favor of the regularity of the proceedings of courts of general jurisdiction; yet this rule cannot be invoked in favor of their summary proceedings under special statutory powers in derogation of the common law, as to which they are placed upon the same footing with courts of limited and special jurisdiction, and must strictly pursue the statute. 391
5. *Common law presumed to exist in sister States.*—By the common law, a man was not bound by any judicial proceeding, to which he was neither a party nor a privy, and against which he had no opportunity to defend; and any foreign statute, or rule of court, contravening this principle, and authorizing the court to proceed without notice, or upon publication, must be affirmatively shown, or the proceeding will be held void for want of jurisdiction. .... 391
6. *Invalidity of Georgia judgment establishing lost note.*—A summary judgment rendered under the statute of Georgia giving the Superior Court "power and authority to establish copies of lost papers", &c., "under such rules and precautions as are or may be customary and according to law and equity", will be held void in the courts of this State for want of jurisdiction of the person, when the record does not show the statute authorizing the court to proceed without notice. .... 391
7. *Plea to jurisdiction of foreign court.*—Ordinarily, in debt on a foreign judgment, a plea, averring that the defendant was without the jurisdiction of the court and had no notice, should also allege that he did not, either in person or by attorney, appear to the action; but this rule only applies to cases in which the record shows that the court had jurisdiction of the person; and where this does not appear, the defendant may, under the general issue, show that the court had no jurisdiction. 391

JURISDICTION—CONTINUED.

8. *Summary proceeding, if record show jurisdiction, like other suits.*  
A statutory proceeding by notice and motion, on the part of a surety against his co-surety, if the defendant appears and pleads, and the issues are tried by a jury, is like any other case commenced in the ordinary mode, except that the record must show that the court had jurisdiction. *Rutherford's Adm'r v. Smith*..... 417
9. *In summary proceedings, record must affirmatively show compliance with statute.*—Where a special and limited jurisdiction is conferred by statute, upon either an individual or a court, the record must affirmatively show a compliance with all the requisition of the statute.—*Owen v. Jordan* ..... 608
10. *Summary proceeding must pursue statute.*—Where a special authority, in derogation of the common law, is conferred by statute on a court of general jurisdiction, it becomes, *quoad hoc*, an inferior or limited court; a compliance with the requisitions of the statute is necessary to its jurisdiction, and must appear on the face of its proceedings. *Gunn v. Howell* ..... 663
11. *Judicial ascertainment of jurisdictional fact.*—Where the jurisdiction of the court to proceed in the summary mode provided by the statute depends upon the existence of a preliminary fact, as where an execution, with a return of "no property," is required before process of garnishment can issue, the record must affirmatively show either the existence of the fact itself, or that the court determined its existence; but if the court erroneously determine that the fact does exist, its actual existence cannot be collaterally inquired into, and the error does not affect the validity of the proceedings ..... 663

LACHES.

1. *Laches does not affect plaintiff's right to enjoin.*—In cases where the plaintiff's right is not clear until established at law, equity will refuse to enjoin, if it is shown that he has been guilty of any improper delay in applying to the court; but this principle has no application, where his right is clear, and of such a character as entitles him to ask the interference of the court without resorting to law in the first instance.—*Burden v. Stein* ..... 104
2. *Lien of judgment not lost by laches.*—The lien of a judgment which has not become dormant is not lost or impaired by laches in issuing execution.—*De Vendell v. Doe ex dem. Hamilton*..... 156

LANDLORD AND TENANT.

1. *Tenant incompetent witness for landlord.*—A tenant, who is in possession of the premises sued for, is not a competent witness for his landlord: if the verdict is against him, he would be liable for the mesne profits, and might also be turned out of possession; and since the mesne profits may be worth more than the rent of the land, his interest is not balanced.—*Doe ex dem. Kennedy's Heirs v. Reynolds*..... 364
2. *Attornment of tenant does not destroy landlord's possession.*—Attornment to a stranger, by the tenant in possession, does not, of itself, destroy or affect the possession of his landlord. .... 364
3. *Recovery conclusive only as to term laid in demise.*—A recovery in ejectment is only for the unexpired portion of the term laid in the de-



## LANDLORD AND TENANT—CONTINUED.

- mise: after its expiration, plaintiff cannot have execution on his judgment; and if he enter, with or without execution, he is a trespasser, and attornment does not make the party in possession his tenant. . . . . 364
4. *When general assignee for benefit of creditors becomes assignee of lease.*—If the lessee make a general assignment of "all his property whatsoever" for the benefit of his creditors, the trustee becomes bound as assignee of the lease, if he accepts the assignment and enters under the lease.—*Dorrance v. Jones*. . . . . 630
5. *What is sufficient acceptance and entry.*—If the trustee enter upon and take possession of the leasehold premises, and use them for the purpose of selling the goods assigned, this is such an acceptance and election as will bind him as assignee; and, the election once made, he cannot recede from it. . . . . 630
6. *Negotiable note does not extinguish rent.*—The negotiable note of the lessee, for the amount of the rent, is not an extinguishment of the rent reserved by the lease. . . . . 630

## LEGACIES.

See EXECUTORS AND ADMINISTRATORS, 3, 7.

WILLS, 1, 2, 3, 6, 7, 8, 9.

## LIMITATIONS, STATUTE OF.

1. *Bill for injunction to restrain diversion of water.*—The statute of limitations of six years is no bar to a suit in equity to restrain an unlawful diversion of water from complainant's mill.—*Burden v. Stein*. . . 104
2. *Recovery in ejectment.*—A recovery in ejectment, without an entry under it, does not stop the statute of limitations.—*Doe ex dem. Kennedy's Heirs v. Reynolds*. . . . . 364
3. *Statute begins to run at what time.*—If a surety for the defendant in execution, having control of the judgment, under an agreement to hold and use it for the defendant's benefit on his payment of it, purchases his lands at execution sale, and afterwards re-sells them, taking a note for the purchase money, which he places in the hands of a third person for the benefit of the defendant, who afterwards brings an action to recover its proceeds,—the statute of limitations does not begin to run from the payment of the judgment, but from the subsequent receipt of the money.—*Garrett's Adm'rs v. Garrett & Garrett*. . . . . 687

## LOTTERIES.

See CRIMINAL LAW, 5, 6.

## MALICIOUS PROSECUTION.

1. The cases of *Leaird v. Davis*, 17 Ala. 27, *Long v. Rogers*, *ib.* 540, same parties 19 *ib.* 321, *Ewing v. Sanford*, *ib.* 605, and 21 *ib.* 157, cited and approved.—*Martin v. Hardesty*. . . . . 458
2. *Evidence of plaintiff's general bad character admissible.*—In an action to recover damages for a malicious prosecution for larceny, the defendant may introduce evidence of the plaintiff's general bad character, showing that his only occupation was that of gambling and horse-racing; since it would require less stringent proof to make out probable cause for prosecuting a man of such character, than one who had always maintained a good reputation and followed a lawful occupation. 458



## MANDAMUS.

1. *Lies in favor of wife, on chancellor's refusal to allow temporary alimony pending suit for divorce.*—The wife has a right to a support out of her husband's estate, pending a suit for divorce against him, and also to such sum as is necessary to procure solicitors to conduct the suit for her; and when this right is denied by the chancellor at any time before permanent alimony is finally set apart to her, a *mandamus* will be awarded from the Supreme Court, to compel him to make the necessary order, as there is no other adequate and specific remedy.—*Ex parte King*... 387

## MARSHALLING ASSETS.

1. *English doctrine.*—In England, though the personal estate is the primary fund for the payment of debts, yet the testator himself, by express direction or plain implication, might devote his realty to that object instead of his personalty; and whenever debts are thus chargeable on land, while the personalty is given either pecuniarily or specifically, courts of equity, acting on the presumed intention of the testator, will so marshal the assets as to exonerate the personalty and throw the debts on the realty.—*Lightfoot et al. v. Lightfoot's Executor*..... 351
2. *Descended lands liable for debts in case of what legacies.*—Descended lands are liable for the excess of debts, after the provision made by the testator is exhausted, before general pecuniary legacies, or other specific legacies; and a gift of all the property of a specified kind which the testator possesses, when not given as a residuary bequest, is for this purpose considered specific..... 351
3. *Under statutes of this State.*—In this State, although the personalty is the primary fund for the payment of debts, yet the real estate is also bound for them, irrespective of their character, to the same extent that recognizances and debts by specialty bound real assets in England; and hence, with us, descended lands are liable for the excess of debts, in exoneration of a legacy of "all the negroes not before bequeathed."... 351

## MORTGAGES AND CONDITIONAL SALES.

1. *Mortgage taken by bona fide creditor, with implied notice of debtor's insolvency, conveying all his property, and containing terms beneficial to him, held fraudulent and void as to other creditors.*—A *bona fide* creditor, whose debt was past due, and who was charged with implied notice of the insolvency of his debtors, took from them, as the best terms he could obtain for his security, a mortgage on all their property of whatsoever description—to-wit, all their partnership effects, books, notes, and accounts; and all their individual property, consisting of lands and negroes, all the stock and provisions then on hand, or which might afterwards at any time be on hand, all the cotton and corn which might be produced up to the law-day of the mortgage, all farming utensils, and household and kitchen furniture. The law-day of the mortgage was postponed for nearly six years, the possession in the meantime remaining with the mortgagors; and it was shown that the property conveyed greatly exceeded in value the amount of the mortgage debt: *Held*, that the mortgage was fraudulent and void as to the other creditors of the mortgagors.—*Wiley, Banks & Co. v. Knight*..... 336
2. *Mortgage void for constructive fraud, not valid security in part.*—Where

## MORTGAGES AND CONDITIONAL SALES—CONTINUED.

- a part of the consideration of a mortgage, which is void for constructive fraud as against creditors, is the payment by the mortgagees of a previous incumbrance on a portion of the property, it cannot stand as a valid security for their reimbursement. . . . . 336
3. *When equity will control mortgagee whose mortgage becomes oppressive.*—The principle that equity will control the action of a mortgagee, whose mortgage becomes oppressive to a third party, applies only to mortgages fairly made, and not to such as operate in the nature of assignments by insolvent debtors of all their property. . . . . 336
4. *Fraudulent contracts cannot be established in equity.*—Equity will not interfere to declare a contract, which is on its face an absolute sale, to be a trust or mortgage, when the evidence shows that the transaction was intended to defraud the vendor's creditors. *In pari delicto, potior est conditio possidentis.*—Brantley v. West. . . . . 542
5. *Sufficiency of parol evidence to convert written contract of sale into trust or mortgage.*—Where a party seeks relief in equity in the face of a written instrument, asking that an absolute sale may be held a trust or mortgage, he must establish his case by clear and convincing proof. It is not sufficient to raise a doubt, or suspicion, whether the writing expresses the true contract of the parties; nor is proof by several witnesses of defendant's subsequent declarations, which are not charged in the bill, sufficient to outweigh the positive denial of his answer under oath, the writing itself, and the testimony of the subscribing witness. . . . . 542
6. *Purchase by mortgagee at mortgage sale.*—If the mortgagee, through an agent, becomes himself the purchaser at the sale under the mortgage, the mortgagor may avoid the sale, but no other person can complain of it.—Edmondson v. Welsh and Wife. . . . . 578
7. *Executory contract of sale construed.*—Articles of agreement, bipartite, whereby the party of the first part "doth hereby agree to bargain, sell, and convey," unto the party of the second part, certain slaves, in consideration that the party of the second part "hereby delivers to the said" party of the first part, "by order, all his right, title, and interest, both in law and equity, to the sum of \$2,000", part of an amount just recovered from the United States by an agent of the party of the second part; and conditioned, that if the said party of the second part "will, by any means, with or without suit, either in law or equity, enable the said" party of the first part "to recover said sum of \$2,000, with lawful interest," from said agent, then the said party of the first part "binds himself, his heirs, executors, &c., that the above bill of sale shall be absolute, and shall convey unto him, his heirs, executors, &c., all right, title, and interest in said slaves; otherwise, to be void and of no effect,—held neither a mortgage, nor an absolute sale, but an agreement to sell, which did not, *per se*, pass the legal title to the slaves.—Love v. Crook et al. . . . . 624
8. *Conditional sale construed.*—A written contract for the sale of several slaves, at a specified price for each, which uses present words of conveyance, and contains the additional stipulations, that two of the slaves are to remain in the possession of the vendor until the first day of January next thereafter, and that he "may redeem any and all the said negroes, at the valuation hereinbefore affixed to them, within twelve

## MORTGAGES AND CONDITIONAL SALES—CONTINUED.

- months",—is not a mortgage, but a conditional sale, with a reservation of the right to re-purchase.—*Murphy v. Barefield*. . . . . 634
9. *Validity of subsequent contract between parties having conflicting claims to mortgaged property*.—Persons who have conflicting claims to slaves previously conveyed by mortgage or conditional sale, to which they were not parties, may by subsequent contract settle and adjust their rights to the property; and such subsequent contract itself, irrespective of the character of the former contract, must be considered as the ascertainment and adjustment between themselves of their rights. . . . . 634
10. *Subsequent contract construed*.—If, by such subsequent contract, after reciting the previous contract and the conflicting claims which have arisen to the property, it is stipulated and agreed that one of the two negroes shall remain in the possession of each party "until the sums for which they were respectively mortgaged be fully paid" unto the party of the second part, who claims to be the assignee of the original mortgagee, or purchaser; the party of the first part "relinquishing all further right"; and the party of the second part "obligating himself to convey to her perfect and complete titles whenever said sums respectively are paid",—the transaction is not on its face a mortgage, and does not authorize a court of equity to grant any relief to either party founded on it. . . . . 634

See ESTOPPEL, 3.

## NOTICE.

1. *Notice implied from circumstances*.—Complainants, having a large claim, past due, on a mercantile firm then on the eve of insolvency, placed it, for collection or security, in the hands of an attorney at law, who resided in the same town with the debtors. The attorney, although he did not know positively that the debtors were in failing circumstances, knew that a mortgage for a large debt covered their property, that there were other demands existing against them, some of which were in his own hands for collection, and for which he had endeavored to obtain collateral security, and that the balance of the notes and accounts due the firm, which had not been transferred to others, was almost worthless; and knowing these facts, he took from them, as the best security he could obtain for his clients, a mortgage on all their property, containing terms very beneficial to the debtors: *Held*, that these circumstances were sufficient to charge him with implied notice of the debtors' insolvency.—*Wiley, Banks & Co. v. Knight*. . . . . 336
2. *Notice to agent is notice to principal*.—If notice, actual or implied, is brought home to an agent or attorney, it is immaterial whether the principal had personal knowledge of the fact: since the principal is presumed, both at law and in equity, to know whatever his agent knows. . . . . 336
3. *Purchaser of land in possession of third person affected with notice*.—Where one purchases land in the possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights binding on his vendor.—*Garrett v. Lyle*. . . . . 586



## OVERRULED CASES.

1. *Mayor and Aldermen of Mobile v. Yuille*, 3 Ala. 137, as to third head-note, holding by-law of municipal corporation void. overruled by *Mayor and Aldermen of Huntsville v. Phelps*. . . . . 55
2. *Freeman & Warren v. Jordan*, 17 Ala. 500, corrected, as to first head-note, by *Spoor v. Phillips*. . . . . 193
3. *Connoley v. Cheesborough*, 21 Ala. 166, holding bill of exchange, before acceptance, an assignment of funds in hands of drawee, overruled by *Sands & Co. v. Matthews, Finley & Co.* . . . . . 399

## PARTNERSHIP.

1. *Dissolution of partnership by death*.—The death of a partner dissolves the partnership, if there is no stipulation for its further continuance.—*Sims v. McEwen's Adm'r*. . . . . 184
2. *Liability of partnership on note given, with concurrence of majority of partners, for necessary supplies, ordered by one partner, for persons engaged in its business*. Where three persons are engaged in carrying on a steam saw-mill in co-partnership for a specified term, and during its continuance the note of the firm is given, with the concurrence of two of the partners, for necessary supplies, ordered by one of them, for the hands engaged in carrying on the business, the partnership is bound by it.—*Johnston & Co. v. Dutton's Adm'r*. . . . . 245
3. *Effect of notice by one copartner that he will not be bound for any future debt contracted on account of partnership*.—If a firm consists of but two partners, each having an equal voice in the direction and control of the common business, either may protect himself against liability on a future contract, by giving notice of his dissent to the person with whom it is about to be made; and where the partnership consists of more than two persons, one of whom gives notice of his dissent, the party contracting with the others acts at his peril, and cannot hold the dissenting partner liable, unless his liability results from the articles, or from the nature of the partnership. . . . . 245
4. *Majority shall rule, in the absence of express stipulations*.—When a partnership consists of more than two persons, there is an implied understanding, in the absence of express stipulations to the contrary in the articles of partnership, that the acts of the majority, as to all matters within the scope of the common business, shall bind the firm; and if one partner, in such case, gives notice of his dissent before the creation of the contract, he is nevertheless bound by the act of the other partners, and there is no necessity that he should be consulted by them in the matter. 245
5. *For what causes equity will dissolve partnership*.—A court of equity may decree the dissolution of a partnership during the term for which it was entered into, and declare it void *ab initio*, where there is fraud, imposition, misrepresentation, or oppression in the original agreement; and may also decree a dissolution for causes arising subsequently to its formation, founded upon the misconduct, fraud, or violation of duty by one partner, or on account of his inability or incapacity to perform his obligations, and to contribute his skill, labor, and diligence in the promotion and accomplishment of the objects of the partnership, or for the existence of an impracticability in the undertaking for which the partnership was formed.—*Fogg & Vanderslice v. Johnston*. . . . . 432



PARTNERSHIP—CONTINUED.

6. *Dissolution decreed from time of abandonment of contract by injured party and notice thereof.*—Where it is shown that the partner asking a dissolution was deceived and misled by the misrepresentations of his co-partner as to his skill and capacity as a machinist and engineer, and but for these misrepresentations would not have entered into the partnership: and that the defendant, since the formation of the partnership, has been guilty of misconduct and violation of duty,—a dissolution may be decreed, if the complainant's equities so require, to date from the time of his abandonment of the contract and notice thereof given to the defendant. . . . . 432
7. *When partnership creditors cannot share with separate creditors in estate of deceased partner.*—When the estate of the deceased partner is not sufficient to pay its separate debts, and the surviving co-partner has a joint fund in his hands, the partnership creditors are not entitled to share equally with the separate creditors in the estate of the deceased partner. *Bridge & Co. v. McCullough's Adm'rs.* . . . . . 661
8. *Covenant by continuing partner to pay outstanding partnership debts.*—On the dissolution of a partnership, if the remaining partner, who takes all the goods and partnership effects, covenants to become solely responsible for the outstanding partnership debts, the covenant is not one of indemnity merely, but binds him to discharge the retiring partner within a reasonable time from all liability for the debts; and if he dies without complying with his engagement, and his estate is declared insolvent, the retiring partner has a claim against the estate to the amount of the outstanding debts.—*Peacey's Creditors v. Peacey's Adm'r.* . . . . . 683

PHYSICIANS.

1. *Construction of statutes prohibiting unlicensed physicians from practicing.*—The effect of the acts of 1823, 1826, and 1832, (*Clay's Digest*, pp. 487–8, §§ 2, 9, 10,) construed together, is to render void all bonds, notes, promises, &c., given or made to an unlicensed physician, in consideration of medical services rendered by him, unless his name has been enrolled in one of the medical boards of this State, or unless he practices on the botanic system only; and when suit is brought on a note, which is shown to have been given in consideration of medical services rendered, no recovery can be had, unless it is proved that the person by whom the services were rendered was not within the prohibition of the statute. *Mays, adm'r, &c. v. Williams.* . . . . . 267

PLEADING AND PRACTICE AT LAW.

1. *Descriptive words mere surplusage and cause no variance.*—If the plaintiff in detinue, in his writ and in the commencement of his declaration, describes himself as suing "as trustee for his wife", the superadded words are mere surplusage, or *descriptio persone*; and although the endorsement on the writ describes the slave sued for to be the separate property of the wife, while the declaration avers that plaintiff "was possessed as of his own property", there is no variance of which the defendant can take advantage, either by moving to strike the declaration from the file, or by craving oyer of the writ and endorsement thereon and demurring to the declaration.—*Gibson v. Land.* . . . . . 117

## PLEADING AND PRACTICE AT LAW—CONTINUED.

2. *Agreement discharging jury, and submitting cause to decision of judge, held equivalent to demurrer to evidence, and waiver to all previous exceptions to admissibility of evidence.*—The bill of exceptions, after setting out all the evidence in the case, together with several exceptions reserved by defendant to the rulings of the court on the admissibility of certain portions of it, proceeded thus—"This being all the evidence, and the value of the slave and the damages for her detention having been agreed upon by the parties, and the jury having been discharged by their consent; and it having been further agreed, that if in the opinion of the court the law upon the foregoing facts was with the plaintiff, a judgment should go in his favor for said negro and damages and costs of suit, as on jury and verdict, and that if the law was with the defendant, judgment should go in her favor"; and then recited the judge's decision in favor of plaintiff, and defendant's exception thereto: *Held*, that the agreement was a waiver of all objections and exceptions previously made and reserved to the admissibility of evidence, and that the court was bound to take the facts which the evidence tended to prove as the admitted facts of the case..... 117
3. *Husband may maintain detinue in his own name, without joining wife, to recover slave in which she has vested remainder, after termination of life estate.*—If a slave is bequeathed to one person for life, with a vested remainder to an unmarried woman, who subsequently (and after the slave has gone into the possession of the first taker with the executor's assent) marries, her husband may, after the termination of the life estate, maintain detinue in his own name, without joining his wife, against a purchaser from the person having the particular estate; Chilton, C. J., and Goldthwaite, J., resting the decision on the ground, that marriage vests in the husband the absolute interest in all the wife's personal chattels which she has in actual possession, and the right to recover by suit her personal chattels held adversely by others; and Rice, J., holding that the absolute title was vested in him..... 117
4. *Refusal to strike out immaterial averments in declaration.*—The refusal to strike out immaterial averments, or matters which are stated in the declaration only by way of inducement, is not a reversible error, since the plaintiff could derive no advantage from them, nor could the defendant be thereby prejudiced.—*Goldsmith, Forcheimer & Co. v. Picard.* 142
5. *Plea of pendency of another action.*—The pendency of another action between the same parties is good matter in abatement only, and, when pleaded with pleas in bar, should be stricken out on motion; but if the plaintiff demurs to it, the overruling of his demurrer (even if erroneous) is not an available error, when the record shows that he afterwards recovered judgment on the issues joined.—*Holley v. Younge.*..... 204
6. *Pleading to amended complaint, without objection, waives error in its allowance.*—After a demurrer has been sustained to the original complaint, and leave given to the plaintiff to amend, if the defendant pleads to the amended or substituted complaint, without objecting to the leave to amend, or to the amendment itself, he thereby waives his right to revise on error the action of the court in allowing it.—*Bryan et al. v. Wilson.*..... 208
7. *That plaintiff is not the party really interested in the note, good plea un-*

## PLEADING AND PRACTICE AT LAW—CONTINUED.

- der Code*.—A plea in bar by the makers of a promissory note, in a suit brought by the payee, that the plaintiff was not the party really interested in the note, was held bad on demurrer under the practice existing before the adoption of the Code, because the action was then required to be brought in the name of the party having the legal interest; but such a plea is now good under the Code, which requires (§ 2129) the suit to be prosecuted "in the name of the party really interested, whether he have the legal title or not." ..... 208
8. *Special plea of non est factum must be verified by affidavit*.—A special plea, averring facts which amount to nothing more than a denial of the execution of the note sued on in such a manner as to make it binding on the defendants, is bad on demurrer unless verified by affidavit. .... 208
9. *Plea which does not go as far as it professes is bad on demurrer*.—In a suit against three, two of the defendants filed a special plea, commencing, "And the said D. and S., for separate plea in this behalf, by leave of the court pleaded, say *actio non*, because they say," &c., and concluding,—“and so the said D. and S. say, that as to them, the said note is void,” &c.: *Held*, that the plea was bad on demurrer, because it professed to answer the action, and to constitute a bar as to all the defendants, while it was good as to only two of them. .... 208
10. *Demurrer to several pleas, of which one is good*.—Where a demurrer to several pleas, each going to the whole declaration, is overruled, and the plaintiff declines to reply, the judgment on the demurrer will not be reversed on error if any one of the pleas is good.—*Firemen's Insurance Co. v. Cochran & Co.* ..... 228
11. *Death of one of several co-plaintiffs before suit brought, in trespass to try titles, defeats entire action*.—The rule which obtains in ejectment, that the death of one of several lessors of the plaintiff does not abate the suit, nor destroy the right of the survivors to proceed, does not apply to the action of trespass to try titles, which must be brought in the name of the real parties; but in the latter action, the death of one of several co-plaintiffs before suit brought, defeats the action, and may be pleaded either in abatement or in bar.—*Crump et al. v. Wallace*. .... 277
12. *Plea to jurisdiction of foreign court*.—Ordinarily, in debt on a foreign judgment, a plea, averring that the defendant was without the jurisdiction of the court and had no notice, should also allege that he did not, either in person or by attorney, appear to the action; but this rule only applies to cases in which the record shows that the court had jurisdiction of the person; and where this does not appear, the defendant may, under the general issue, show that the court had no jurisdiction.—*Foster v. Glazener*. .... 391
13. *Variance between instrument declared on and that offered in evidence*.—Whatever may be the effect of the provisions of the Code, on objection raised to the complaint, in dispensing with the necessity for the same technical precision which was formerly required in a declaration; yet where the instrument offered in evidence varies from that described in the complaint, the variance renders "it inadmissible.—*May & Bell v. Miller & Co.* ..... 516 45
14. *Plea which does not go as far as it professes bad on demurrer*.—A plea which professes to be an answer to the action as to five of the slaves



## PLEADING AND PRACTICE AT LAW—CONTINUED.

- sued for, while it constitutes a good defence only as to one of them, is fatally defective on demurrer.—*Wittick v. Traun*. . . . . 562
15. *Demurrer to evidence*.—When a demurrer is interposed to evidence adduced in support of a plea, the defendant may be compelled to join in it; and if the evidence is insufficient to support the plea, judgment should be rendered for the plaintiff.—*Williams v. McConico*. . . . . 572
16. *Construction of admission on application for continuance*.—Where an application is made for a continuance on account of the absence of a material witness, and the adverse party admits that the witness, if present in court, would swear to the facts stated in the affidavit, this is neither an admission that the facts stated are true, nor that the witness is competent to testify.—*M. W. Plank-Road Co. v. Webb*. . . . . 618
17. *What is sufficient averment of prosecution*.—An allegation that a prosecution was instituted against the defendant before the grand jury of the county, and that they refused to find a true bill against him for the killing,—held sufficient, on the authority of *Nelson v. Bondurant*, 26 Ala. 341.—*Morton v. Bradley*. . . . . 640
18. *Statement of venue in complaint*.—When the name of the county is specified in the summons, and the complaint avers that the prosecution was had before the circuit court of “said county”, the venue is laid with sufficient certainty. . . . . 640
19. *Specification of grounds of demurrer*.—Under a demurrer to the complaint because it does not show a sufficient prosecution, the objection cannot be raised that the venue is not well laid, since the Code (§2253) requires that the ground of demurrer must be distinctly stated. . . . . 640
20. *When words “administrator,” &c., are descriptio personæ*.—Where the complaint puts in issue the plaintiff’s individual title to the slave sued for, the superadded words “administrator,” &c., in the margin or caption of the complaint, are *descriptio personæ* merely.—*Agee v. Williams*. 644
21. *How foreign statute must be pleaded*.—As a general rule, where a party claims a right, based, not upon the common law, but upon a statute of a foreign jurisdiction, it devolves upon him to prove that statute as a fact; and in pleading, he is required to set out the statute, in order that the court may see that the right claimed is in conformity with it.—*Gunn v. Howell*. . . . . 663
22. *How judgment of sister State must be pleaded*.—But, in pleading the judgment of a sister State, to which “full faith and credit” are to be given (U. S. Constitution, Art. IV, § 1), it is not necessary to set out affirmatively the facts upon which the power and authority of the court by which it was pronounced depended. . . . . 663
23. *Plea in abatement construed strictly*.—Pleas in abatement are not viewed with favor, and are construed most strongly against the pleader; the rule requires that every inference, however slight, should be repelled.—*Roberts v. Heim*. . . . . 678
24. *Non-joinder of partner, when defendant in attachment, not pleadable in abatement*.—If an attachment against one partner is levied on the goods of the partnership, and the other partner brings an action for damages against the attaching creditor, the non-joinder of the defendant in attachment is not good matter for plea in abatement. . . . . 678



## PLEADING AND PRACTICE IN CHANCERY.

1. *Parties to bill for injunction.*—The corporate authorities of Mobile are not necessary parties to a bill filed against the lessee of the City Water-Works, by another riparian proprietor, to restrain an unlawful diversion of water from complainant's mill.—*Burden v. Stein*. . . . . 104
2. *Bill filed by husband and wife held her bill alone.*—When a bill, which is filed in the name of husband and wife, concerns only the separate estate of the wife, seeks only to establish and protect her rights and interests, and asks no relief for or against her husband, it will be regarded as the bill of the wife alone, and the husband will be considered only her trustee or next friend.—*Gerald and Wife v. McKenzie*. . . . . 166
3. *Bill for specific performance of contract—Vagueness and uncertainty in contract alleged.*—Where the alleged contract was, "that upon the purchase by said defendant of said lot and improvements, he and complainant were to have and own jointly all the estate purchased as aforesaid—that is to say, said defendant was to own one-half of said property, and complainant one-half of said property; complainant to superintend the erection of certain buildings of brick, as mentioned in the deed of mortgage on said lots, to repay to said defendant the moneys by him paid out (and the interest thereon) on account of said purchase, and on account of said buildings, and for all provisions, horses, wagons, and mules furnished by him for the benefit of said firm; and complainant to take charge of the same as a hotel, and have one-half the profits thereof, and one-half of the rents thereof, and the said proceeds to be applied to the payment of said debt," &c.—the court inclined to the opinion, that a specific performance might be refused, on the ground that the agreement as alleged was too vague and uncertain; but the bill was dismissed on other grounds.—*Sims v. McEwen's Adm'r*. . . . . 184
4. *Variance between allegations and proof.*—When the contract set up in the answer and proved is materially different from that alleged in the bill, although the defendant may have a specific performance without resorting to a cross bill, yet the same rule applies to the plaintiff as in other cases—he must prove the case made by the bill. . . . . 184
5. *Proof without allegations will not support decree.*—No decree can be rendered which is not founded on an allegation in the bill, notwithstanding there may be ample testimony to justify it.—*Spoor v. Phillips*. . . . . 193
6. *Acts of cruelty proved but not alleged no ground for divorce.*—Specific acts of cruelty which are established by the evidence, but not charged in the bill, cannot be made the foundation for a decree, although the court may well consider and give weight to them as tending to explain and corroborate other acts specifically alleged in the bill.—*David v. David*. . . . . 222
7. *Substance of charge only need be proved.*—The particular act of violence charged in the bill must be substantially proved, but it is not necessary that all the non-essential circumstances attending it should be proved precisely as alleged; thus, where the wife charged in her bill that her husband struck her several times with a stick, choked her down, and drew his knife and threatened to cut her throat, while the evidence was that he choked her, struck her with a whip, and pulled her hair—held no material variance. . . . . 222
8. *Distinction between opening an account and surcharging and falsifying it.*—When an account is opened on the ground of fraud, the whole of it may be

## PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

- unraveled; but where permission is merely given to surcharge and falsify, the account stands as *prima facie* correct, and the *onus* of proving mistakes is on the party alleging them; and therefore, where a bill is filed to impeach a decree on the ground of fraud, if the answer denies all fraud, but admits an error or mistake, the complainant cannot have a decree unless he amends his bill.—*Cowan and Wife v. Jones*. . . . . 317
9. *Dismissal of bill without prejudice—Laches in failing to amend.*—The dismissal of a bill which seeks to impeach a decree on the ground of fraud, though no reservation be made of complainant's right to file another for the purpose of surcharging and falsifying the account on the defendant's admission of mistakes, does not prejudice that right; but if the practice were otherwise, the complainant's laches in failing to amend his bill would be a good ground for refusing to modify the decree on error, so as to dismiss the bill without prejudice. . . . . 317
10. *General prayer authorizes what relief.*—Under the general prayer for relief, complainant cannot have a decree inconsistent with the allegations of their bill; as where mortgagees ask the reformation of their mortgage and an injunction against judgment creditors of the mortgagor, and their mortgage is held fraudulent and void against such creditors—they cannot, under the general prayer, have established as a valid security in their hands a previous incumbrance on the property, which they allege was paid and discharged, and constituted a part of the consideration of their mortgage.—*Wiley, Banks & Co. v. Knight*. . . . . 336
11. *Uncertainty in immaterial allegations no ground of demurrer.*—Where the substantial allegations of the bill, if proved, would establish a resulting trust in favor of the complainant, independent of the agreement under which the money is alleged to have been paid, uncertainty in the terms of the alleged agreement is immaterial, and constitutes no ground of demurrer.—*Cagle et al. v. McCollum*. . . . . 461
12. *General prayer authorizes what relief.*—Under the prayer for general relief, when the bill is not filed in a double aspect, no relief can be granted which is inconsistent with that specifically prayed for.—*Simmons v. Williams*. . . . . 507
13. *Injunction dissolved for want of equity, and bill retained for other relief.* Whenever the allegations of the bill are not sufficient to warrant the interference of the court by injunction, the injunction may properly be dissolved for want of equity, although the bill may be retained for other relief.—*Norris v. Norris*. . . . . 519
14. *Allegation of wife's fear, without stating facts, insufficient to enjoin husband's removal of his property.*—Where a wife files a bill against her husband for a divorce *a vinculo*, and alleges "that she has just cause to fear, and in fact does fear, that upon the filing and service of this bill he will remove or dispose of his whole property", but does not state the facts which cause her fears, the allegations are not sufficient to authorize an injunction to prevent the removal of the defendant's property. . . . . 519
15. *Variance between allegations and proof.*—Where the bill alleged a single contract, by which complainant transferred six slaves to defendant, in consideration that he should pay all the just debts of complainant: while the proof showed that there were two contracts, made on different days, and that defendant promised to pay only those debts which

## PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

- were then in execution,—*held*, that the bill was properly dismissed on account of the variance.—*Brantley v. West*. . . . . 542
16. *Rule that plaintiff must recover on strength of his own title*.—Although, in equity, as well as at law, a plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's; yet it is not necessary that he should show a good title against all the world, but it is enough that he shows a right to recover against the defendant.—*Garrett et al. v. Lyle*. . . . . 586
17. *Variance between allegations and proof*.—When a bill is filed to obtain the rescission of a contract on the ground of fraud, while the evidence shows only an honest mistake, the variance between the allegations and proof is fatal.—*Williams v. Sturdevant*. . . . . 598
18. *Costs*.—The bill in this case having been dismissed on account of a variance between the allegations and proof, the costs were imposed on the complainant, because he had manifested a desire by no means commendable to get rid of his bargain, when only a small portion of the land, of which he retained undisturbed possession, had (through mistake) been omitted from his conveyance, and his vendor was solvent. . . 598
19. *Hearing on bill and answer*.—Although the answer is to be taken as true in every respect, when the cause is submitted by consent on bill and answer only; yet, where the answer admits enough to sustain a decree for complainant, his bill should not be dismissed.—*Lampley et al. v. Weed & Co.* . . . . . 621
20. *Order directing issue at law interlocutory merely*.—An order in chancery directing an issue at law is interlocutory merely, and may therefore be set aside at a subsequent term.—*Dabbs v. Dabbs*. . . . . 646
21. *When new trial may be refused*.—Although the inheritance is concerned, a new trial of the issue may be refused to the heir, notwithstanding the erroneous rulings of the court trying the issue, when, on all the evidence in the case, if the verdict of the jury had been against the validity of the will, a new trial should have been awarded. . . . . 646

## POWERS.

1. *Execution of power of appointment*.—A bequest by will to the separate use of a married daughter, by a widow having a life estate with a power of appointment in favor of her children, is a good execution of the power.—*Friend v. Oliver*. . . . . 532

## PRINCIPAL AND AGENT.

See AGENCY.

## PRINCIPAL AND SURETY.

See SURETIES.

## PRESUMPTIONS AND LEGAL INTENDMENTS.

1. *Presumption that every man knows the law*.—The rule that every man is presumed to know the law, is now too firmly settled by a long course of judicial decisions to be disturbed; and although it may frequently be productive of hardship or injustice, yet this consideration can only properly be addressed to the executive, or to the law-making power.—*Erwin et al. v. Hamner* . . . . . 296



## PRESUMPTIONS AND LEGAL INTENDMENTS—CONTINUED.

2. *Common law presumed to exist in sister State.*—The courts of this State will presume that the common law is in force in a sister State, except so far as it is shown to have been changed or repealed by statute. *Reese v. Harris*..... 301
3. *Common law presumed to exist in sister States.*—By the common law, a man was not bound by any judicial proceeding, to which he was neither a party nor a privy, and against which he had no opportunity to defend; and any foreign statute, or rule of court, contravening this principle, and authorizing the court to proceed without notice, or upon publication, must be affirmatively shown, or the proceeding will be held void for want of jurisdiction.—*Foster v. Glazener*..... 391
4. *Presumption that continuous fact, once proved, still exists.*—Where a witness is shown to have been a stockholder in an incorporated company three years before the trial, it will be presumed that he continued to be a stockholder at the time of the trial.—*M. & W. Plank-Road Co. v. Webb*..... 618
5. *Injury presumed from error.*—Injury will be presumed from the erroneous admission of irrelevant evidence, unless the contrary clearly appears; since, if such evidence can do no other harm, it may obscure the real points in issue.—*Thomas v. De Graffenreid*..... 651
6. *Injury presumed from error.*—If an incompetent witness, to whom objection is duly made and reserved, is allowed to testify to material facts, injury will be presumed from the error, unless such presumption is repelled by the record; and though some of the facts to which he deposes are proved by witnesses on the other side, yet this does not cure the error.—*Doe ex dem. Kennedy's Heirs v. Reynolds*..... 364

## REAL ACTIONS.

1. *Proof of demand on which judgment was rendered not required of purchaser.*—A purchaser at sheriff's sale, who brings ejectment against the grantee of the defendant in execution, is not required to prove the demand on which the judgment under which he purchased was founded, but may recover on proof of the judgment, execution, and sheriff's deed. 156
2. *Death of one of several co-plaintiffs before suit brought, in trespass to try titles, defeats entire action.*—The rule which obtains in ejectment, that the death of one of several lessors of the plaintiff does not abate the suit, nor destroy the right of the survivors to proceed, does not apply to the action of trespass to try titles, which must be brought in the name of the real parties; but in the latter action, the death of one of several co-plaintiffs before suit brought, defeats the action, and may be pleaded either in abatement or in bar.—*Crump et al. v. Wallace*..... 277
3. *Tenant in common may maintain separate action.*—Tenants in common of land may maintain separate actions of trespass to try titles for their respective interests.—*Hines and Wife v. Trantham*..... 359
4. *Rules of practice and evidence described by Code do not apply to suits pending when it took effect.*—The rules of practice and evidence prescribed by the Code, by force of the exception contained in section 12, do not apply to suits pending when it went into operation—to wit, on the 17th January, 1853; and the provision of section 2211, which gives the defendant in real actions a right to demand an abstract of the plaintiff's title, is one of these rules.—*Doe ex dem. Kennedy's Heirs v. Reynolds*..... 364



REAL ACTIONS—CONTINUED.

5. *Recovery in ejectment, conclusiveness of.*—A recovery in ejectment is only for the unexpired portion of the term laid in the demise ; after its expiration, plaintiff cannot have execution on his judgment ; and if he enter, with or without execution, he is a trespasser, and attornment does not make the party in possession his tenant. . . . . 364
6. *Does not stop statute of limitations.*—A recovery in ejectment, without an entry under it, does not stop the statute of limitations. . . . . 364
7. *Estoppel against setting up outstanding title.*—Where the plaintiff and defendant in ejectment derive title through mense conveyances from the same vendor, there is no necessity for proof of title beyond him, and the defendant cannot set up an outstanding title in a third person ; and that the plaintiff claims under a quit-claim deed, while the defendant claims under a subsequent purchase at execution sale, does not affect the principle, unless the defendant can show that the defendant in execution, after the execution of plaintiff's quit-claim deed, acquired a superior title.—*Gantt v. Doe ex dem. Cowan.* . . . . . 582

REDEMPTION OF REAL ESTATE.

1. *Rights of purchaser at sheriff's sale.*—The purchaser of land at sheriff's sale under execution, on receiving the sheriff's deed, becomes the absolute owner, and is entitled to the rents and profits on entering into possession ; and nothing is left in the former owner, or his judgment creditor, but the naked right to redeem, which must be asserted in the time and manner prescribed by the statute.—*Spoor v. Phillips.* . . . . 193
2. *Right of redemption how perfected.*—The right to redeem is not perfect, and cannot be enforced in equity, until there has been either a full performance by the plaintiff of all the statutory requisitions, or a valid and sufficient excuse for his non-performance, without any fault or neglect on his own part ; and when the bill alleges an excuse for such non-performance, the excuse must be accompanied with an offer in the bill to perform all that the statute requires. . . . . 193
3. *Tender in bill by judgment creditor, when sufficient.*—If the bill does not show that a tender was made before it was filed, a tender made in it is not sufficient to authorize a decree for the redemption, unless, in connection with such offer, the bill also shows a valid and sufficient excuse for the omission to make a tender before it was filed. (Correcting first head-note to *Freeman & Warren v. Jordan*, 17 Ala, 500.) . . . . . 193
4. *Liability of purchaser for rents and profits.*—The liability of the purchaser to account for rents and profits, except "by way of offset to the improvements made," does not arise until he is put in default. . . . . 193
5. *What is not default.*—If no tender is made to the purchaser during his life-time, he is not in default at his death ; and if, upon his dying intestate, a bill to redeem is filed by a judgment creditor against his administrator and minor heirs, a tender in the bill, unless accompanied by the payment of the money into court, does not put the defendants in default, and no decree can be rendered against them for the rents and profits. . 193
6. *What interest passes by decree of redemption.*—Under the statute (Clay's Digest, p. 502, § 1) which authorizes a judgment debtor, whose lands have been sold under execution, "to redeem the interest that may have been sold", it is error to decree that the purchaser convey the land by

## REDEMPTION OF REAL ESTATE—CONTINUED.

- quit-claim deed, since he may have acquired some other interest than that which passed at the sale.—*Weathers v. Spears*:..... 455
7. *Liability of purchaser for rents and profits*.—Rents and profits, accruing before a tender and refusal, may be set off against improvements made; but if they exceed the value of the improvements, the purchaser is not liable for the excess: he is liable only for rents and profits accruing after the tender..... 455
8. *Entitled to what interest*.—The purchaser is entitled, on decree of redemption, to ten per cent. interest on his purchase money until the tender and refusal, and to eight per cent. afterwards..... 455
9. *Objection to agent's authority to make tender*.—The defendant in a redemption suit cannot raise the objection in his answer, that the agent, by whom the tender was made, was not authorized to make it, unless he objected to the tender on that ground when it was made.—*Lampley et al. v. Weed & Co.*..... 621

## RETAILING.

See CRIMINAL LAW, 9, 10, 16, 17, 18 and 19.

## RIPARIAN RIGHTS.

1. *Riparian proprietor may enjoin in equity without first establishing his right at law*.—Equity will entertain a bill for injunction by a riparian proprietor, whose title is clear, to restrain a diversion of the water from his mill, without requiring him first to establish his right at law, or to allege that he has been in possession of the land for three years: such a bill may well be supported on the ground that complainant cannot obtain full reparation in an action at law for damages, and, further, because the injury may involve the necessity of a multiplicity of suits. *Burden v. Stein*..... 104
2. *Reservation of right to divert cannot be implied, as against vendee with absolute conveyance, in favor of strangers*.—The absolute deed of a riparian proprietor conveys the right to the undiminished flow of the stream, and no reservation of a right to divert can be implied from the fact that, at the time of the execution of the conveyance, he diverted the water to supply a mill on another tract of land owned by him; especially when the claim is set up by a stranger:..... 104
3. *Laches does not affect plaintiff's right to enjoin*.—In cases where the plaintiff's right is not clear until established at law, equity will refuse to enjoin, if it is shown that he has been guilty of any improper delay in applying to the court; but this principle has no application, where his right is clear, and of such a character as entitles him to ask the interference of the court without resorting to law in the first instance.... 104
4. *Right of eminent domain, and its application to the City Water-Works of Mobile*. The right of eminent domain, in the assumption and appropriation of private property for public uses, is recognized and admitted, and supplying a city with water is admitted to be a public use within the meaning of the constitution; but this right can only be exercised upon making just compensation to the owner, nor does it confer on the lessee of the City Water-Works of Mobile, in connection with the several acts of the legislature relating thereto, the power to deprive other riparian proprietors of their right to the water of Bayou Chataque, which he can only obtain by pursuing the course pointed out in the statute.. 104

SALES, JUDICIAL.

1. *Title of purchaser at sheriff's sale.*—If a deed of trust is void as against a judgment creditor for want of due registration, it cannot operate to place the title beyond the lien of his judgment; the purchaser at sheriff's sale receives the same protection, and acquires the legal title to the land.—*DeVendell v. Doe ex dem. Hamilton*. . . . . 156
2. *Rights of purchaser at sheriff's sale.*—The purchaser of land at sheriff's sale under execution, on receiving the sheriff's deed, becomes the absolute owner, and is entitled to the rents and profits on entering into possession; and nothing is left in the former owner, or his judgment creditor, but the naked right to redeem, which must be asserted in the time and manner prescribed by the statute.—*Spoor v. Phillips*. . . . . 193
3. *Liability of purchaser for rents and profits.*—The liability of the purchaser to account for rents and profits, except "by way of offset to the improvements made," does not arise until he is put in default. . . . . 193
4. *What is not default.*—If no tender is made to the purchaser during his lifetime, he is not in default at his death; and, if, upon his dying intestate, a bill to redeem is filed by a judgment creditor against his administrator and minor heirs, a tender in the bill, unless accompanied by the payment of the money into court, does not put the defendants in default, and no decree can be rendered against them for the rents and profits. . . . . 193
5. *Sheriff's sale void for uncertain description of land.*—A sale under execution of two hundred and forty acres of land, out of a tract containing two hundred and eighty acres in a single body, when there is no description or other means of distinguishing the portion levied on and sold from the residue of the tract, is void for uncertainty and indefiniteness of description.—*Deloach v. The State Bank*. . . . . 437
6. *Liability of purchaser for rents and profits.*—Rents and profits, accruing before a tender and refusal, may be set off against improvements made; but if they exceed the value of the improvements, the purchaser is not liable for the excess: he is liable only for rents and profits accruing after the tender.—*Weathers v. Spears*. . . . . 455
7. *Entitled to what interest.*—The purchaser is entitled, on decree of redemption, to ten per cent. interest on his purchase money until the tender and refusal, and to eight per cent. afterwards. . . . . 455

See STATUTES, CONSTRUCTION OF. 1.

SCIRE FACIAS.

1. *Against Bail.*—see *Ingram v. The State*. . . . . 17  
*The State v. Brantley*. . . . . 44
2. *To revive judgment.*—see *DeVendell v. Doe ex dem. Hamilton*. . . . . 156

SET-OFF.

1. *What are demands not sounding in damages merely.*—A demand "not sounding in damages merely", under the statute of set-off (Code, § 2240,) is one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard; and therefore, under this statute, if a vendee with covenants of warranty buys in an outstanding vendor's lien, at a price less than the amount of the purchase money and interest, this demand, if reasonable, would



## SET-OFF—CONTINUED.

- be a good set-off in an action on the note given for the purchase money.  
*Holley v. Young*..... 203
2. *When demand for unliquidated damages against insolvent estate of assignor may be set off in equity against assignee.*—A demand for unliquidated damages, arising from a breach of covenant of title, may be set off in equity against a note founded on an independent consideration, when the vendor is dead and his estate insolvent; but to make it available as an equitable set-off against an assignee of the note, it must be shown to have accrued before notice of the assignment.—*Wray's Adm'rs v. Furniss*. 471
3. *When distinct cross demands may be set off in equity.*—The mere existence of mutual and independent demands does not authorize the interposition of equity to set them off against each other; but, to warrant the interference of equity, there must be circumstances from which it can be inferred that one debt was contracted on the faith of the other, or that there was an agreement between the parties that the one should be discounted from the other, or there must be some other intervening equity which renders the interposition of that court necessary for the protection of the demand sought to be set off.—*Simmons v. Williams*..... 507
4. *Demand due to administrator cannot be set off in equity against his individual debt.*—An administrator *de bonis non* having recovered a decree, on final settlement, against the administrator in chief, the money was collected under execution against the surety on the latter's official bond; and the decree having been afterwards reversed on error, the surety sued at law to recover the money: *Held*, that the defendant could not enjoin the judgment at law, by alleging that he had paid over the money to the distributees of the estate, some of whom were insolvent and non-resident; that he had subsequently recovered another decree against the principal administrator, on which execution had been issued and returned 'no property'; and that the surety had been indemnified by his principal ..... 507

## SHERIFFS.

1. *Judicially known.*—The courts are bound to know judicially who are the sheriffs of the several counties in the State.—*Ingram et al. v. The State*. 17

## SLAVES.

1. *Validity of directions by will concerning government and treatment of slaves.*—If a testator gives specific directions by will to his executor, concerning the treatment and government of his young slaves, until they arrive at the age fixed for their emancipation, which contemplate that they shall remain in this State and yet occupy a condition of qualified freedom, the trust is invalid, since our law recognizes no other *status* than that of absolute freedom or absolute slavery; but where he directs his executor "to receive them into his possession, to take care of, protect, govern, and control them, until they arrive at age, according to the laws of this State, treating them with humanity according to the position they occupy in society, and see that they are not imposed upon by others", the directions create no additional obligation on the executor to that which would exist independently of them, and are not illegal.—*Abercrombie's Ex'r v. Abercrombie's Heirs* ..... 489
2. *Validity of bequest of freedom to slaves.*—A bequest of slaves to an executor, with directions "to have their freedom secured to them when



SLAVES—CONTINUED.

- they shall have arrived at age, by the laws of this State, if it can be done, so that they may remain here, and, if he cannot do so, to send them to some free State or country, wherever in his discretion will be best for them," is a valid trust, which the executor, under our existing laws, has full authority to execute; and if the laws in force at the time fixed for their emancipation should not allow them to remain in this State free, and the executor should then refuse to remove them, after having submitted his administration to a court of equity, although the slaves themselves might not be able to enforce the execution of the trust by suit, the court would have ample powers to enforce it. . . . . 489
3. *Validity of pecuniary legacies to slaves.*—A pecuniary legacy to a slave, to vest immediately on the testator's death, is void, because he is incapable of taking as legatee; but if the legacy is not to be paid until the time fixed for his emancipation, and there is no express gift before the time of payment, it is valid. . . . . 489
4. *Residuary legacy to person incapable of taking distributable among next of kin.*—If a testator appoints as his residuary legatees a slave woman and her children, and directs the emancipation of the children only, the legacy to the mother is void, and she herself, with her portion of the residuary legacy, must be regarded as property not disposed of by the will, and therefore distributable to the next of kin under the statute . . . . . 489
5. *Liability of hirer of slave for negligence.*—The hirer of a slave is responsible only for the omission of that care and diligence which the generality of mankind use and exercise in relation to their own slaves under similar circumstances; and if he re-hires the slave to another, his own contract of hiring being general in its terms, he is equally responsible for the same degree of negligence on the part of his bailee.—*Alabama & Tenn. Rivers Railroad Co. v. Burke.* . . . . . 535
6. *Failure to call in physician not necessarily negligence.*—The law does not make it the duty of the hirer, under a contract general in its terms, to call in a physician on every occasion when the slave is sick and he does not know what is the matter with him; nor does it pronounce him guilty of neglect, merely because he does not, under such circumstances, call in a physician. . . . . 535
7. *Act tending to show negligence may be proved to have been done under advice of physician.*—Where the plaintiff introduces evidence of an act tending to show negligence in the treatment of the slave—*e. g.*, his removal by railroad, while sick—the defendant has the right to prove that he acted under the advice of a physician. . . . . 535

SPECIFIC PERFORMANCE.

See CHANCERY, 5, 6, 12, 13.

PLEADING AND PRACTICE IN CHANCERY, 3, 4.

STATUTES, CONSTRUCTION OF.

1. *Construction of statute requiring registration of deeds of trust.*—*DeVendell v. Doe ex dem. Hamilton.* . . . . . 156
2. *Construction of acts for liquidation of Planters and Merchants' Bank of Mobile.* 156
3. *Construction of statutes prohibiting unlicensed physicians from practicing.*—*Mays, adm'r, &c., v. Williams.* . . . . . 267

## STATUTES, CONSTRUCTION OF—CONTINUED.

4. *Virginia statutes of distribution*.—At common law, the title to the personal property of an intestate is cast upon his personal representative, and not upon his next of kin; and the statutes of Virginia, as shown in the record in this case, have not changed the common law in this respect; and consequently a sole distributee in Virginia, who has never had possession, before administration granted or distribution made, has not such a title to the personalty as will sustain detinue.—*Reese v. Harris*. 301
5. *Rule for computation of time under statute*.—In the computation of time from an act done, the day of performance is excluded, and fractions of a day are not recognized; but in construing a statute, which, as between different acts, gives a preference or priority to that which is first done, this rule, *it seems*, does not apply.—*Lang v. Phillips*. . . . . 311
6. *Application of rule*.—Under the statute regulating the practice in the common-law courts of Mobile, which provides (Pamphlet Acts 1853-4, p. 92, § 10) that “the lien acquired by any execution issuing from either of said courts shall not be lost, if *alias* executions issue to the sheriff without interval of more than ninety days”, an original execution was returned on the 14th April, and an *alias* was issued on the 14th July next thereafter: *Held*, that the lien was not lost. . . . . 311
7. *Construction of statute requiring appointment of commissioners, when judge of county court is interested, to make settlements with executors*.—*Heydenfeldt v. Towns et al.*. . . . . 424
8. *Retroactive effect of statute*.—Evidence tending to show a parol gift of a slave, cannot be rebutted by proof of a statute subsequently enacted, under which the gift would be invalid: since the statute cannot retroact on the gift, nor affect it in any way, it is irrelevant evidence.—*Thomas v. De Graffenreid*. . . . . 651
9. *Georgia statute of garnishment construed*.—*Gunn v. Howell*. . . . . 663
10. *Insolvent laws of Georgia construed, and held no defence to action for recovery of property omitted from schedule*.—*Garrett's Adm'rs v. Garrett & Garrett*. . 687

See FRAUDS, STATUTE OF.

LIMITATIONS, STATUTE OF.

## SUMMARY PROCEEDINGS.

1. *Statutory proceeding in Georgia to establish lost note, not proceeding in rem*.—The summary remedy given by statute in Georgia to establish a lost note (Prince's Digest, p. 420, § 6), being predicated on an *ex parte* affidavit, and without notice to the party to be affected thereby, cannot be assimilated to suits commenced by original attachment, or others analogous to proceedings *in rem*, since the court has custody of neither the person nor the thing.—*Foster v. Glazener*. . . . . 391
- SEE JURISDICTION, 4, 6, 8, 9, 10.

## SURETIES.

1. *Principal and surety—New contract between surety and creditor*.—If the surety on a note, given for the purchase money of a slave, executes his own note to the payee, “in discharge of the balance remaining due”, and takes up the original note, his position as surety is exchanged for that of creditor; he becomes the principal in his new note, and cannot defeat a recovery on it, by setting up fraud in the sale of the negro, or a breach of the warranty of soundness.—*Fluker v. Henry's Adm'r*. . . . . 403

SURETIES—CONTINUED.

2. *Summary proceeding, if record show jurisdiction, like other suits.*—A statutory proceeding by notice and motion, on the part of a surety against his co-surety, if the defendant appears and pleads, and the issues are tried by a jury, is like any other case commenced in the ordinary mode, except that the record must show that the court had jurisdiction.—*Rutherford's Adm'r v. Smith*. . . . . 417
3. *When equality is equity.*—When parties stand in *æquali jure*, with reference to liabilities arising *ex contractu*, equality of burthen becomes equity. *Crayton v. Johnson*. . . . . 503
4. *How this equity may be destroyed.*—But, although parties are equally bound to bear the burthen of any loss which may accrue from their joint contract, this equality may be destroyed by the act of one party in super-inducing the loss, or by their subsequent contract. . . . . 503

TENANTS IN COMMON.

1. *May maintain separate actions.*—Tenants in common of land may maintain separate actions of trespass to try titles for their respective interests. *Hines and Wife v. Trantham*. . . . . 359

TRESPASS TO TRY TITLES.

See REAL ACTIONS.

TRIAL OF RIGHT OF PROPERTY.

1. *Husband, as trustee, may interpose a claim at law.*—If no trustee is provided for in the marriage settlement, the legal title to the separate estate of the wife is necessarily vested in the husband, if he reduces the property into possession; and having the legal right, he may interpose a claim at law, when her property is levied on, and try the right of property. *Gerald and Wife v. McKenzie*. . . . . 166
2. *Endorsement of levy on fi. fa. admissible evidence against claimant.*—The sheriff's endorsement on a *fi. fa.* of his levy is admissible evidence against the claimant, on a trial of the right of property, for the purpose of showing its levy on the slave in controversy.—*Thomas v. Henderson*. . . . . 523
3. *Facts tending to show defendant's adverse possession, at or before levy, admissible evidence for plaintiff.*—That the defendant in execution resided on, and claimed as his own, the plantation on which the slave in controversy worked; that his son, who was controlling the slave avowedly as his overseer, and his daughter, who was the claimant, resided on the plantation with him at that time; and that said defendant, while the slave was being thus controlled, declared that his son was his overseer,—are facts tending to prove the defendant's possession under claim of ownership, and are admissible evidence to show adverse possession. . . . . 523
4. *Declarations of ownership by one in possession admissible as part of the res gestæ.* The declarations of the defendant in execution to the sheriff, when the latter was about to levy an execution on another slave as the property of his son—"that he might go contented without her, that he would never get a negro there on his son's account, and that every negro there belonged to himself"—when it was shown that the slave in controversy was then in his possession, are admissible evidence as part of the *res gestæ*, being explanatory of his possession. . . . . 523



## TRIAL OF RIGHT OF PROPERTY—CONTINUED.

5. *Relevancy of evidence as tending to show ownership.*—Where the slaves in controversy lived and worked on the plantation owned by the defendant in execution, together with himself and his children, and constituted a part of his family, the fact that he furnished the family with necessities, is evidence (though weak) tending to prove his ownership of the slaves.—*Thomas v. DeGraffenreid*. . . . . 651
6. *Relevancy of evidence as tending to disprove ownership.*—But the fact that the defendant in execution did not obtain credit on the faith of the slaves in his possession, is not competent evidence to disprove his ownership. 651
7. *Declarations in disparagement of title.*—Declarations made by the defendant in execution, while in possession of the slave in controversy, to the effect that said slave did not belong to him, but to the claimant, who was his daughter, although they may be entitled to but little (if any) weight, are admissible evidence for the claimant. . . . . 651
8. *Value of property at time of trial.*—The plaintiff in execution may prove the value of the property at the time of trial. . . . . 651
9. *Conclusiveness of judgment on trial of right of property.*—If the claimant recover judgment on verdict against the plaintiff in attachment, on a trial of the right of property under the statute, and afterwards bring an action for damages against him, the judgment on the trial of the claim suit is conclusive on the point that the defendant in attachment had no interest in the property.—*Roberts v. Heim*. . . . . 678

## TROVER AND CONVERSION.

1. *Transfer of bills and notes by unauthorized person is conversion.*—The unauthorized transfer, by the secretary of an incorporated insurance company, of promissory notes and bills of exchange belonging to the company, is a conversion for which trover may be maintained.—*Firemen's Ins. Co. v. Cochran & Co.* . . . . . 228
2. *Conversion waived by subsequent ratification of transfer.*—Such a conversion may be waived by a subsequent ratification by the company of the transaction, with full knowledge of all the facts ; and the ratification may be either express or implied. . . . . 228
3. *Ratification implied from bringing assumpsit against secretary, and taking judgment against transferree as garnishee.*—If the plaintiff, with full knowledge of the tort, brings assumpsit against its secretary for the amount of the bills and notes, summons the transferree by process of garnishment, takes judgment against him for the balance of indebtedness admitted by the answer on account of the bills and notes, and coerces satisfaction of the judgment—this will be held a confirmation of the transaction, and will estop the company from afterwards bringing trover against the transferree. . . . . 228
4. *Conversion defined.*—To constitute a conversion, it is not necessary that the party should have had the exclusive control, or actual manucaption of the goods ; the term embraces, in its legal import, any intermeddling with, or dominion over the property of another, subversive of the rights of the true owner ; as, if the defendants are actually present, aiding and assisting another in the unlawful design of removing plaintiff's slaves from the State, with the intention of wrongfully depriving him of his property, even though it be for the use and benefit of his wife,



TROVER AND CONVERSION—CONTINUED.

- each act, in furtherance of the common design, is the act of all, and all are guilty.—*Freeman v. Scurlock et al.*..... 407
5. *Facts reasonably tending to show conversion.*—On separation between plaintiff and his wife, and a division of their property had by consent, the slaves here sued for in trover were allotted to the wife, and afterwards went into the possession of her brother, against whom the plaintiff brought detinue. The sheriff went with the process to the neighborhood in which the slaves were, but did not find them; and on the second or third night afterwards, the wife, in company with a minor brother, who is one of the defendants in this action, started with the slaves to Montgomery. They were met by the other defendant, with his wagon, at 11 o'clock that night, several miles from the place of starting, and proceeded in his wagon to Montgomery; travelling by the usual route. At Montgomery, the wife and her brother, with the slaves, took passage on a boat, and proceeded to Texas, where she and the slaves remain; and the other defendant returned home. The bill of exceptions states, also, that there was evidence "tending to show that the defendant's wagon had been engaged without telling him the object, that neither of the defendants exercised control over the slaves, and that the brother went to Texas as the escort of his sister": *Held*, that the evidence reasonably tended to prove a conversion, and that the court therefore erred, in instructing the jury that, if they believed all the evidence, they must find for the defendants..... 407
6. *Bailee of widow, before administration granted on her husband's estate, not liable for value of property to administrator subsequently appointed.*—If a widow hires out a slave belonging to the estate of her deceased husband, before administration granted, and the bailee returns it at the expiration of the term, in as good condition as when he received it, he is not liable in trover to an administrator subsequently appointed for the value of the slave and interest.—*Williams, adm'r, &c. v. Crum.*..... 468
7. *Measure of damages.*—The general rule in trover, that the measure of damages is the value of property at the time of the conversion with interest thereon, was adopted to give the plaintiff a full indemnity for the injury sustained by the defendant's wrongful conversion of his property, and to prevent the defendant from deriving any benefit from his own wrongful act; but there are cases to which this rule has no just application, and in which the equity of the case is allowed to mitigate the damages..... 468
- See ACTION, 3.

TRUSTS.

1. *Resulting trust in lands purchased by administrator with funds of the estate, and re-sold at a profit.*—If an administrator purchases land, or other property, with the money of the estate, and afterwards re-sells it at a profit, the benefit of the purchase cures to the estate, and not to himself individually.—*Mosely et al. v. Lane* ..... 62
2. *Estopped by his conduct from denying that the purchase was made with funds of the estate.*—Where an administrator agrees with his co-administrator that they will buy certain lands for the estate at the Government land sales, and in compliance with that agreement procures him to join in raising funds for that purpose, and charges the estate

## TRUSTS—CONTINUED.

- with the expense of raising those funds; and prevents his co-administrator and the only adult son of the decedent from attending the sales, by assuring them that he will buy the lands for the estate, and at the sales prevents other persons from bidding for them, by declaring that he had come there expressly to buy them for the estate; and by these means, and with these funds, buys the lands for a sum greatly below what he would otherwise have had to pay for them, and takes the title in his own name, and soon afterwards re-sells them for a large profit,—he is estopped in equity, as against those representing the estate, from denying that the funds belonged to the estate. (Chilton, C. J., *dissenting*.) 62
3. *In whose favor trust enures*.—If the agreement was to purchase the lands “for the estate,” and the administrators knew at the time that the estate was free from debt, the resulting trust enures to the benefit of the residuary legatees of the estate. (Chilton, C. J., *dissenting*.) . . . . . 62
4. *Resulting trust established against purchaser at sheriff’s sale in favor of defendant in execution*.—The evidence in this case showed these facts: Complainant’s land was sold under execution, and bought in by defendant at about one-sixth of its real value. At the time of the sale, defendant declared to several persons that he was buying in the land for complainant, and requested them not to bid for it; and after the sale, on several occasions, he declared that he had bought it in for complainant, and that complainant was to have it if he repaid the money by the next term of the court. Within a month after the sale, when defendant had paid nothing on the execution, complainant had an interview with him, went with him to the sheriff’s office, and there counted out and paid, in his presence, the amount of his bid; which was thereupon credited on the execution: *Held*, that these facts made out a clear case of resulting trust.—Caple et al. v. McCollum. . . . . 461
5. *Statute of frauds does not apply to resulting trusts*.—The statute of frauds has no application to trusts created by operation of law alone, which may always be established by parol, except where some rule of evidence prevents it. . . . . 461
6. *Bequest to executor in trust enures to next of kin on failure of trust*. Where property is bequeathed to an executor in trust for a specific object, which fails or is declared invalid, he takes no personal interest in it, but a resulting trust then arises in favor of the next of kin.—Abercrombie’s Ex’r v. Abercrombie’s Heirs . . . . . 489

## VENDOR AND VENDEE.

1. *Fraudulent misrepresentations by vendor no defence at law against deed*.—The only fraud which can be set up at law to avoid the operation of a sealed instrument, is that which goes to its execution: fraudulent misrepresentations, on the part of the vendee, to the effect that he would not use the deed against his covenantor, are no defence at law.—Holley v. Younge . . . . . 201
2. *Discharge of note by subsequent parol agreement*.—A parol agreement between vendor and vendee, made on discovering that the vendor had no title to a portion of the land conveyed, to the effect that the vendee should be discharged from the payment of the balance due on the note, unless the vendor made him a good title to that portion of the

VENDOR AND VENDEE—CONTINUED.

- land within a reasonable time, is valid, and constitutes a good defence to an action on the note to recover the balance.—*Hussey v. Roquemore*. 281
3. *Retention of possession by vendee*.—If the vendee retain the possession of the land under the contract, this might operate as a waiver or extension of the time for the delivery of the deed; but if he abandon it within a reasonable time, the note cannot be enforced against him, even though he retain the possession of the other portions. . . . . 281
4. *Measure of damages*.—The damages resulting from the failure of the vendor to make title to the land being uncertain, and the difference between the value of the land and the balance due on the note being slight, the agreement is not in the nature of a penalty, which would only entitle the vendee to scale the note to the amount of the actual value of the land; but discharges him, if titles are not made, from the entire balance due on the note . . . . . 281
5. *Promise to make deed not performed by tender of another's deed*.—If the vendor, on discovering that he has no title to a portion of the land, promise to "make a valid deed" thereto, the vendee is not bound to accept the deed of a stranger, which, though it conveyed a good title, might yet involve the trouble and expense of an inquiry to ascertain its validity: he has a right to stand on the terms of his contract. 281
6. *What is reasonable time*.—A promise made on the 8th December, 1849, to make titles "within a short time" thereafter, is not complied with by tendering a deed "after the 13th October, 1851," and after the vendee had abandoned the land . . . . . 281
7. *When vendee may enjoin judgment on account of vendor's insolvency*.—A vendee, with covenants of warranty, against whom a judgment is recovered on the notes given for the purchase money, and who is afterwards evicted from the land under title paramount, may enjoin the judgment in equity, when the estate of his vendor is insolvent, and the defence could not have been made at law.—*Wray's Adm'r v. Furniss*. 471

VERDICT.

1. *When defendant is entitled to judgment on verdict*.—Where issue is joined on several pleas in bar of the action, one of which is good, and the jury by their verdict "find the issues in favor of the defendants", the defendants are entitled to judgment; and if the court erred in overruling demurrers to the other pleas, it is error without injury, which will not reverse the judgment.—*Brantley v. The State*. . . . . 44
2. *Judgment on verdict for defendant*.—Issues being joined on the pleas of *non detinet* and justification under legal process, a verdict finding the defendant not guilty, and assessing the damages and the separate value of the slaves, is sufficient under the statute to support a judgment in his favor.—*Rowan v. Hutchisson*. . . . . 329
3. *Sufficiency of verdict in detinue*.—In detinue for eight slaves, a trial being had on the plea of the general issue, the jury returned a verdict that "they find for the plaintiff, and assess the value of the slaves sued for as follows." &c. (specifying by name, and assessing the separate value of all the slaves, except one, as to whom the verdict was entirely silent,) "and they also find the hire of said slaves to be \$200": *Held*, that the verdict was not sufficient to authorize the rendition of judgment; while *RICE, J., dissenting*, held that it was a good finding for the plaintiff for



## VERDICT—CONTINUED.

- the seven slaves named, with their hire as damages for their detention, and against the plaintiff as to the slave not named in the verdict. *Wittick v. Traun*..... 562
4. *Inquest of jury, on writ of ad quod damnum, held insufficient.*—The writ of *ad quod damnum* in this case was issued on an application to the probate court for the elevation of a mill-dam already erected (Code, §§ 2089–98); and the inquest of the jury was quashed, because, 1st, the return did not show that the jury were sworn by the sheriff “to discharge their duties fairly and to the best of their ability”; 2dly, it did not show that they were charged by the sheriff as the statute directs; and, 3dly, it did not respond to the matters which the statute requires them to investigate. *Owen v. Jordan*..... 608

## WATER-WORKS, MILL-DAMS, &amp;c.

1. *Right of eminent domain.*—The right of eminent domain, in the assumption and appropriation of private property for public uses, is recognized and admitted, and supplying a city with water is admitted to be a public use within the meaning of the constitution; but this right can only be exercised upon making just compensation to the owner, nor does it confer on the lessee of the City Water-Works of Mobile, in connection with the several acts of the legislature relating thereto, the power to deprive other riparian proprietors of their right to the water of Bayou Chataque, which he can only obtain by pursuing the course pointed out in the statute.—*Burden v. Stein*..... 104
2. *Corporate authorities of Mobile not necessary parties to bill against lessee.*—The lessee of the City Water-Works of Mobile, under his lease from the city, can have no higher powers than his lessor had; and if he be enjoined in equity, for an unlawful diversion of water from the mill of another riparian proprietor, his lessor is not a necessary party to the bill.... 104
3. *Inquest of jury, on writ of ad quod damnum, held insufficient.*—The writ of *ad quod damnum* in this case was issued on an application to the probate court for the elevation of a mill-dam already erected (Code, §§ 2089–98); and the inquest of the jury was quashed, because, 1st, the return did not show that the jury were sworn by the sheriff “to discharge their duties fairly and to the best of their ability”; 2dly, it did not show that they were charged by the sheriff as the statute directs; and, 3dly, it did not respond to the matters which the statute requires them to investigate.—*Owen v. Jordan*..... 608

## WILLS.

1. *Construction of bequest to testator's wife during her life or widowhood, and if she married, then over to his daughter.*—A bequest was in these words: “I lend unto my beloved wife, during her natural life or widowhood, all my land, also one negro girl called Sarah. \* \* \* Item, my will and desire is, at the death or marriage of my wife, that my son may have my land, to him, his heirs, and assigns forever. Item, I likewise desire, if my wife marries, that my eldest daughter may have the negro girl”: Held, that the *quasi* remainder of the daughter was not contingent, but vested—that she took equally on the death or second marriage of her mother. *Gibson v. Land*..... 117



WILLS—CONTINUED.

2. *As to rule of construction which gives effect to the latter of two repugnant clauses in a will.*—The rule of construction which sacrifices the former of two repugnant clauses in a will, is only applied on the failure of every attempt to give to the whole will such a construction as will render every part effective ; and to this end clauses and sentences may be transposed, if by such transposition a consistent disposition may be deduced from the entire will.—*Pace and Wife v. Bonner*..... 307
3. *Bequest to one of negro woman "and all her increase which she now has or may hereafter have"; and by subsequent clause to another of one of her children by name.* A testator bequeathed to his daughter a negro woman, named Jinney, "and all her increase which she now has or may hereafter have", and by a subsequent clause gave to his son a negro boy named Moses, who was a child of Jinney's : *Held*, that the latter bequest must be construed as an exception to the former, and that the boy Moses passed to the testator's son..... 307

See CHANCERY, 8.

DEBTOR AND CREDITOR, 3.

EVIDENCE, 30.

JUDGMENTS AND DECREES, 11.

SLAVES, 1, 2, 3, 4.

WITNESSES.

1. *When interested witness cannot prove his own release.*—If the interest of a witness appears on the face of the note in suit, and objection to his competency on that ground is made before filing cross-interrogatories, he is incompetent to prove his own release.—*Hiscox v. Hendree*..... 216
2. *Tenant incompetent witness for landlord.*—A tenant, who is in possession of the premises sued for, is not a competent witness for his landlord : if the verdict is against him, he would be liable for the mesne profits, and might also be turned out of possession ; and since the mesne profits may be worth more than the rent of the land, his interest is not balanced.—*Doe ex dem. Kennedy's Heirs v. Reynolds*..... 364
3. *When sub-hirer is competent witness for his bailor.*—If the complaint is so framed as to authorize a recovery only for the negligence of the defendant himself, a person to whom he re-hired the slave during the term, and in whose possession the slave died, is a competent witness for him : *aliter*, if the complaint would also authorize a recovery for the negligence of the witness.—*Ala. & Tenn. Rivers Railroad Co. v. Burke*. 535
4. *Stockholder in private corporation not competent witness for it.* The members or stockholders in a corporation, created for private emolument, are not competent witnesses for the company ; and where the charter provides that the directors "shall be owners of stock", proof that the witness is a director, unexplained and uncontradicted by other evidence, is sufficient to exclude him.—*M. & W. Plank-Road Co. v. Webb*..... 618
5. *When interested witness may prove his own competency.*—If the interest of a witness appears from his own testimony, he may testify to facts which will remove the objection ; *aliter*, when his interest is otherwise shown. 618









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